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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), violated TXO's procedural due process rights.

2. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

3. Whether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E. 2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner TXO Production Corp. has been merged into Marathon Oil Company.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that its parent company is USX Corp.

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PETITION FOR A WRIT OF CERTIORARI

TXO Production Corp. petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App., *infra*, 1a-52a) is not reported. The separately filed concurrence of McHugh, C.J., of the Supreme Court of Appeals of West Virginia (App., *infra*, 53a-54a), is not reported. The ruling of the Circuit Court of McDowell County, West Virginia, on petitioner's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, or, in the alternative, for remittitur, is not reported. The transcript of the proceeding on that motion is included in the Appendix (App., *infra*,

55a-74a) as is the court's written order. (App., *infra*, 75a-76a). The ruling of the Supreme Court of Appeals of West Virginia on the petition for rehearing (App., *infra*, 77a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on May 14, 1992. A petition for rehearing was denied on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

This case presents the quintessential example of punitive damages "run wild." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). The dispute began as a declaratory judgment action brought by petitioner TXO Production Corp. ("TXO") to interpret a mineral severance deed. It resulted ultimately in a jury award against TXO of $19,000 in compensatory damages and $10 million in punitive damages on defendants' counterclaim for slander of title. Although the punitive award was 526 times the compensatory award, and was rendered without the procedural safeguards that this Court found to be crucial in *Haslip*, and that the Supreme Court of Appeals of West Virginia itself had held to be mandated under *Haslip*, the judgment was affirmed on appeal.

1. In the summer of 1984, TXO became interested in leasing a tract of land in McDowell County, West Virginia, known as the "Blevins tract," for purposes of oil and gas exploration and production. App., *infra*, 7a-8a. The title holder, Tug Fork Land Company ("Tug Fork"),

had leased the oil and gas development rights. The lease had been assigned to Alliance Resources Corporation ("Alliance"). App., *infra*, 7a. In 1985, TXO and Alliance signed an agreement under which TXO would pay Alliance $20 per acre for its interest in the Blevins tract; Alliance would assign to TXO its full title and interest in the lease, reserving an overriding royalty interest; and Alliance would reimburse TXO the consideration paid for the lease if TXO determined through title examination that title had failed as to all or any part of the leased premises. App., *infra*, 8a-9a & n.1.

TXO thereafter retained a West Virginia law firm to perform a title examination prior to drilling a well. App., *infra*, 9a. TXO's attorneys found a problem with the title, opining that in a 1958 deed, Tug Fork had conveyed to one Leo J. Signaigo, Jr., the oil and gas rights to the Blevins tract, and that those rights were now held by Signaigo's successor in interest, Virginia Crews Coal Company ("Virginia Crews").[1] App., *infra*, 9a; Tr. 388-90; 409-12.[2]

TXO was unwilling to invest over $200,000 in drilling an oil and gas well on the property until it had cleared any potential cloud on the title. See App., *infra*, 12a. Accordingly, TXO obtained and recorded a quitclaim deed in which TXO was granted any rights that Virginia Crews might have to the property. App., *infra*, 11a.

Thereafter, TXO called a meeting with Alliance. The West Virginia Supreme Court characterized TXO's ac-

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[1] In reaching this conclusion, counsel relied upon the language in the 1958 deed to Signaigo, the non-assessment of any taxes on the mineral estate to Tug Fork and its successors, and importantly, the assessment and payment of taxes on the mineral estate by Virginia Crews and its predecessors in interest. *See* Rec. 1591, 1605, 1611-12 (Pl. Ex. 3).

[2] The record in the Supreme Court of Appeals of West Virginia is cited herein as "Rec." The trial transcript begins at page 2177 of that record. The page numbers of the trial transcript are referenced as "Tr. ——"; they are not otherwise paginated in the record.

tions at that meeting, taken together with TXO's failure to discuss the title problem with respondents prior to having recorded the quitclaim deed, as a bad-faith attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights." App., *infra*, 11a-12a.

2. Shortly after that meeting, on August 23, 1985, TXO filed its complaint in the Circuit Court of McDowell County, West Virginia, for declaratory judgment to quiet title. App., *infra*, 12a. Respondents counterclaimed, alleging the 1958 deed was unambiguous in reserving the entire oil and gas estate to Tug Fork and its assignees, and that the recording of the quitclaim deed on July 11, 1985, constituted a slander of their title to the Blevins tract.

The question whether there was in fact a defect in the chain of title was tried to the court in a bifurcated action. On December 17, 1987, without taking any evidence, the court ruled that title was vested in Tug Fork. App., *infra*, 12a; Rec. 691-722.

In June of 1990, the case on the counterclaim for slander of title went to trial before a jury. The jury found for respondents, and awarded $19,000 to compensate respondents for their attorney's fees incurred in defending the declaratory judgment action brought by TXO. App., *infra*, 12a, 20a. No award was made for any actual damage to respondents' property rights or to their ability to sell or lease the property. See App., *infra*, 20a. Although it found no actual property damage, the jury awarded $10 million in punitive damages against TXO, an amount approximately 526 times the compensatory award.[3]

[3] Over TXO's objections, respondents presented hearsay testimony of unrelated "other acts" of TXO. App., *infra*, 21a-24a. Four attorneys from Louisiana, Oklahoma, and Texas were permitted to give their opinions concerning TXO's conduct in cases filed in those states, wholly unrelated to the parties, facts, or underlying cause of action in the case at bar. App., *infra*, 21a-24a. The West Virginia Supreme Court approved the admission of this testimony under West Virginia's "catch-all" exception to the hearsay rule. App., *infra*, 30a-32a.

TXO moved for judgment notwithstanding the verdict or, in the alternative, for remittitur, based, *inter alia*, upon the excessiveness and disproportionality of the punitive award given the lack of harm to respondents, and the absence of meaningful standards for the jury and the trial court in determining the severity of the award. App., *infra*, 55a-69a. The court, without explanation, denied the post-trial motions from the bench. App., *infra*, 72a.

3. The West Virginia Supreme Court affirmed. First, it rejected TXO's argument that TXO had been denied due process because it was not afforded the procedural safeguards approved in this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, *supra*, 111 S. Ct. 1032, and applied by West Virginia Supreme Court in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) (on remand from the United States Supreme Court, 111 S. Ct. 2882 (1991)).[4] App., *infra*, 7a, 32a.

In *Garnes*, the West Virginia Supreme Court, "following the dictates of *Haslip*," set out a detailed procedure for awarding punitive damages in compliance with the requirements of due process. *Garnes*, 413 S.E.2d at 908. This procedure was designed to provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review." 413 S.E.2d at 908. Under this new system, the trial court is required, at a minimum, to explain five specific criteria to the jury for use in determining the appropriateness and size of a punitive award. App.,

[4] Both *Haslip* and *Garnes* were decided after TXO's motion for judgment *n.o.v.* had been ruled upon.

infra, 33a-34a (citing *Garnes*, 413 S.E.2d at 908-09). These same factors, plus four others, are to be taken into consideration by the trial court upon its review of the award. App., *infra*, 34a (citing *id.* at 909). Finally, the West Virginia Supreme Court's review of a punitive damages award must be based upon the same factors. *Garnes*, 413 S.E.2d at 910. In *Garnes*, the West Virginia Supreme Court reversed the judgment, and remanded the case for a new trial to be conducted under the requirements the court had articulated. *Id.* at 910-11.

The West Virginia Supreme Court, however, took a different course with respect to TXO. Although the court recognized that it had "set out [the *Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*," App., *infra*, 35a, it decided not to apply these guidelines retroactively to cases tried before the *Garnes* decision, thereby denying TXO these due process protections. App., *infra*, 32a.

Additionally, the court rejected TXO's claim that the $10 million award violated substantive due process because it was excessive and disproportionate to the amount of the compensatory award. See App., *infra*, 40a. Purporting to set out "broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages," App., *infra*, 35a, the court concluded:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

App., *infra*, 36a, 51a-52a. The court then explained that "[i]n cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the

outer limit of punitive damages is *roughly* five to one." App., *infra*, 38a (emphasis in original). By contrast, according to the court, "[w]hen the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant . . . . [In such cases] . . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*." App., *infra*, 39a. Based upon the "really mean"/"really stupid" test, the court concluded that the $10 million award against TXO was acceptable. App., *infra*, 40a.[5]

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Appeals of West Virginia in this case denied petitioner TXO the procedures approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), as satisfying the Fourteenth Amendment; it established a new test for appellate review of the size of a punitive award that is inherently arbitrary and thus itself violates due process; and it approved an award so grossly excessive and disproportionate to actual injury that it constitutes a denial of due process. The West Virgina Supreme Court's decision is in conflict with other state- and federal-court decisions rendered post-*Haslip*. This Court's review is therefore necessary to resolve those conflicts and to ensure that defendants in cases involving punitive damages are afforded the protections due under *Haslip*.

A separate compelling reason exists for the Court to review this case. The West Virginia Supreme Court de-

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[5] Chief Justice McHugh, joined by Justice Miller, wrote separately, criticizing the "ridiculous categorization" adopted by the majority to determine what level of punitive damages is permissible. Specifically, the Chief Justice denounced the majority's "use of such subjective and nontechnical terms as 'really mean' and 'really stupid' " as a "cavalier attempt to be clever and amusing." App., *infra*, 53a-54a.

clined to afford TXO the process that, in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, it had earlier held are mandated under *Haslip*, and that it had applied to the parties in that case. By refusing to apply its *Garnes* due process standards to this case, the West Virginia Supreme Court acted in a manner contrary to the principles of retroactivity law animating this Court's decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). This Court should grant review to decide whether, under *James Beam*, state courts must retroactively apply decisions interpreting federal law.

1. In *Haslip*, this Court emphasized that the *three layers* of safeguards provided by Alabama's scheme for imposing punitive damages were vital to its decision upholding the award of punitive damages in that case. 111 S. Ct. at 1046. Under Alabama's system, these safeguards were provided through the jury instructions, post-trial review conducted by the trial court on the record, applying specific criteria, and appellate review, also applying specific criteria. *Id.* at 1044-46. By contrast, TXO was denied "the full panoply of [such] procedural protections." *Id.* at 1046. The $10 million award was subjected to no "meaningful and adequate review by the trial court." *Id.* at 1044. Nor was TXO afforded the sort of appellate review this Court found essential to provide a "definite and meaningful constraint on the discretion of [the] fact finders." *Id.* at 1045. The West Virginia Supreme Court approved a $10 million award made without the procedural protections that are constitutionally required. It is unsurprising that this approval is in conflict with other courts' views of what due process requires under *Haslip*.[6]

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[6] What makes the holding particularly worthy of review by this Court is that the West Virginia Supreme Court is not the only court that has adopted a cavalier approach to *Haslip*. *See, infra*, notes 10 and 11.

a. Under the Alabama procedure approved in *Haslip*, "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so . . . . Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' . . . and 'other factors, such as the impact on innocent third parties.'" 111 S. Ct. at 1044 (citations omitted) (quoting *Hammond* v. *City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

Here, in stark contrast to the approved approach, the trial court summarily denied TXO's post-trial motions from the bench. App., *infra*, 74a. The absence of any post-verdict review on the record deprived TXO of its full due process rights. Yet, the West Virginia Supreme Court found no constitutional infirmity. App., *infra*, 7a.

In several recent cases, other trial courts' summary approvals of punitive damages awarded by juries have been held to violate due process under *Haslip*. In *American Employers Insurance Co.* v. *Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), for example, the jury had awarded $400,000 in compensatory damages and $750,000 in punitive damages against an insurance company on a bad-faith claim. The jury instruction was "substantially similar to the one in *Haslip*," 931 F.2d at 1464, but the trial court denied defendant's motions for judgment *n.o.v.* or, in the alternative, for a new trial and remittitur "without comment," *id.*, as the trial court did here. The Eleventh Circuit found that this summary denial did not meet the *Haslip* standards for post-trial review, and remanded for the trial court to set forth in the record its review of the factors approved in *Haslip*. *Id.*

Likewise, the Eighth Circuit has on two occasions expressed concern over the record's lack of a "meaningful and adequate review by the trial court" of punitive dam-

ages awards, *Haslip*, 111 S. Ct. at 1044, and has remanded those cases for such a review to be placed on the record. Thus, in *Cole* v. *Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991), the jury awarded $2 million in punitive damages, 13⅓ times more than the compensatory award of $150,000. In reviewing the defendant's due process challenge to the punitive award, the court's concern over "whether the district court . . . appropriately reviewed the punitive damage award" caused it to remand the case "so that the district court [might] conduct this review under the standards articulated in *Haslip*." 947 F.2d at 320.

And in *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), the plaintiff was awarded $750,000 in compensatory damages and $8 million in punitive damages. The court first found that the jury instructions were adequate under *Haslip*. *Id.* at 1347. Then the court observed that "*Haslip* also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards." *Id.* The court concluded that the punitive award had to be vacated because the district court, like the trial court here, had "denied summarily" the defense motion for remittitur. Accordingly, the court of appeals "remand[ed] for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip*." *Id.* See also *Medical Mut. Liab. Ins. Soc.* v. *B. Dixon Evander & Assocs.*, No. 1752, 1992 Md. App. LEXIS 144 (Md. Ct. Spec. App. July 13, 1992) (vacating punitive damages and remanding based in part on lower court's failure to record its findings as to the propriety of the award).

In each of these cases, the appellate court overturned an award of punitive damages and remanded for the trial court to provide defendants with the procedural protections mandated by the Due Process Clause, protections that had been eviscerated by the trial courts' summary consideration and rejection of the defendants' claims. In

this case, by contrast, the West Virginia Supreme Court affirmed the judgment and award of punitive damages even though the trial court had summarily rejected TXO's challenge to the punitive damages award without conducting any sort of analysis. The West Virginia trial court's summary approval of the $10 million punitive award is indistinguishable from the decisions of the other trial courts found inadequate by the Eleventh and Eighth Circuits. Review by this Court is clearly warranted to resolve the existing conflict among the lower courts concerning precisely what is required by *Haslip*.

b. Additionally, TXO was deprived of due process at the appellate level. The West Virginia Supreme Court addressed neither the jury instructions nor the nonexistent review by the trial court. Instead, turning its back on the appellate standards articulated in its *Garnes* decision, the West Virginia court formulated and applied a "really mean"/"really stupid" defendant test in lieu of the type of "detailed substantive standards" approved in *Haslip*.[7] 111 S. Ct. at 1045. Setting forth "broad, general guidelines" for future application, App., *infra*, 35a, the court held that the outer limit for punitive damages imposed on "really stupid" defendants is roughly set by a five-to-one ratio, whereas punitive damages imposed on "really mean" defendants are constitutional no matter what their relationship to the plaintiffs' actual injury. App., *infra*, 38a-39a.

This wholly arbitrary "test"[8] does not comport with due process. Rather, it invites trial and appellate courts

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[7] Also representative of the cursory "review" performed by the West Virginia Supreme Court is the court's statement that "because [TXO] and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur." App., *infra*, 7a.

[8] As the West Virginia Supreme Court itself admitted, it is "difficult to distinguish" between "really mean" and "really stupid" defendants subject to punitive damages awards. App., *infra*, 36a n.11. These inherently subjective categories clearly provide no legitimate basis for restricting damages to five times the compensa-

to evaluate subjectively a defendant's acts as either mean or stupid,[9] an endeavor utterly inconsistent with this Court's emphasis on meaningful safeguards to prevent excessive punitive damage awards. See *Haslip*, 111 S. Ct. at 1046 (under Alabama's punitive damages procedure, award "did not lack objective criteria"). This subjective and standardless review cannot be said to provide "an additional check on the jury's or trial court's discretion." *Id.* at 1045.

It is well established that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). No such legally fixed standards inhere in the newly minted "really mean"/"really stupid" defendant test. A defendant thus has no indication of what sort of behavior may arbitrarily be labeled as "really mean," a characterization that will unconstitutionally result in a punitive award that is virtually unlimited.

While the court in this case has adopted an extreme and indefensible interpretation of what *Haslip* permits and requires with respect to excessiveness of punitive awards, the problem of deciding what *Haslip* means is widespread among the lower courts, both state and federal. The results in scores of cases purporting to apply *Haslip* are deeply troubling. The excessive punitive damages awards that alarmed this Court, see *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 280-81, 282 (1989) (Brennan, J., joined by Marshall, J., concurring) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (Brennan, J., joined by Marshall, J., and Stevens, J., dissenting), continue virtually unabated.[10] It is disconcerting that many lower courts have interpreted *Haslip* as providing blanket approval of nearly every punitive damages award and scheme.[11] These cases nod at, rather than

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tory award in one case, but permitting an effectively boundless punitive award in the other.

[9] Two justices of the West Virginia Supreme Court recognized the subjective nature of the "really mean"/"really stupid" test, and concurred separately to disassociate themselves from that "ridiculous categorization." App., *infra*, 53a-54a.

[10] *See, e.g., Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (compensatory damages $317,625, punitive damages $6.1 million), *cert. denied*, 112 S. Ct. 1778 (1992); *Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.) (Jury awarded $919,391 in compensatory damages and $5 million in punitive damages. Compensatory damages were reduced by 20% based on comparative fault, but punitive award left unchanged.), *review granted*, 822 P.2d 1194 (Or. 1991). Even where remittitur has been ordered, punitive awards often remain enormous. *See, e.g., General Motors Corp.* v. *Johnston*, 592 So. 2d 1054 (Ala. 1992) (compensatory damages of $75,000, punitive damages of $7.5 million as remitted); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (compensatory damages of $390,000, punitive damages of $28 million as remitted).

[11] *See, e.g., Coyne* v. *Allstate Ins. Co.*, 771 F. Supp. 673, 680-81 (E.D. Pa. 1991) (stating that Pennsylvania appellate courts provide the sort of "additional check on the . . . trial court's discretion" found crucial in *Haslip* even though the standards applied are abuse of discretion or the reviewing court's determination of excessiveness); *Commonwealth Lloyd's Ins. Co.* v. *Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992) (affirming $2 million punitive damages award based solely on adequacy of jury instruction, without requiring trial court review or conducting appellate review of the factors given to the jury), *writ of error filed* April 22, 1992; *Wolf* v. *Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. Ct. App. 1991) (holding Missouri procedure constitutional under *Haslip* although review for "excessiveness" conducted without articulated standards); *Oberg* v. *Honda Motor Co.*, *supra* note 10 (approving Oregon procedure under *Haslip* notwithstanding the state constitution permits reversal of jury awards of punitive damages only when the reviewing court finds a lack of *any* evidence supporting the award); *K-Mart Corp.* v. *Pearson*, 818 S.W.2d 410, 417 (Tex. Ct. App. 1991) (inter-

heed, the message of *Haslip* that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury," *id.* at 1043, are critical in ensuring that a punitive damages award falls on the acceptable side of a constitutional dividing line. A punitive damages award made with "unlimited jury discretion—or unlimited judicial discretion for that matter," *id.*, must indisputably fall "into the area of constitutional impropriety." *Id.* at 1046. If the intention of the Court in *Haslip* was to establish that all courts must give serious content to the Due Process Clause when approving punitive awards, that purpose has not been achieved. Accordingly, the Court should grant review in this case to make plain that *Haslip* and the Due Process Clause require genuine constraints on jury and judicial discretion, and that the vague, newly invented "test" for punitive damages awards announced by the West Virginia Supreme Court in this case provides no such constraints.

2. Even at first blush, the wide 526-to-one ratio in this case, which involved no personal injury of any sort, must immediately "jar one's constitutional sensibilities." *Id.* at 1043. In *Haslip*, where the ratio of punitive to compensatory damages was four to one, this Court stated that the "monetary comparison[] [was] wide," and might be "close to the line" of constitutional acceptability. *Id.* at 1046. This case, where the punitive damages are 526 times greater than the compensatory damages, is unquestionably out of bounds. In a case involving an alleged business tort, where no actual damages to the property right at issue were found,[12] a $10 million punitive damages award can scarcely be said to bear anything remotely approaching a "rational" relationship to the underlying

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mediate appellate court concluded without analysis that "the trial court's instruction did not give the jury unlimited discretion" under *Haslip*, and "found [the punitive damages award] to be reasonable").

[12] The "compensatory" award consisted of only the attorneys' fees expended by respondents in defending against TXO's declaratory judgment action. *See* App., *infra*, 20a-21a.

$19,000 award. 111 S. Ct. at 1045-46. Moreover, it stretches credulity to believe that an award of $10 million is required to deter TXO or other companies from taking similar actions in the future. While some state and federal courts have reached precisely that conclusion in holding *less* excessive awards to be unconstitutionally disproportionate, other courts have, like West Virginia, interpreted *Haslip* to allow virtually limitless punitive damages.[13] The conflicting decisions highlight the need for this Court's review.

Alexander & Alexander, Inc. v. *B. Dixon Evander & Associates*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992), is directly inconsistent with the West Virginia court's decision. There, an insurance agency and its agent were held liable for conspiracy and tortious interference with contracts held by the plaintiff, a self-employed insurance agent. The jury awarded $250,000 in compensatory damages and $40 million in punitive damages, a ratio of 160 to one. Although the trial court found the punitive damages award to be excessive, and remitted it to $12.5 million, 596 A.2d at 704, the Maryland Court of Special Appeals vacated that award and remanded for a new trial on punitive damages. The court found the punitive award—which as remitted was still 50 times the compensatory award—unconstitutional under *Haslip:*

> Not only is the $12.5 million allowed by the [trial] court extraordinary in terms of Maryland history, it is far in excess of the actual harm caused to [plaintiff], representing nearly fifty times the essentially liquidated compensatory damage . . . . If the $840,000 awarded in *Haslip* came "close to the line" in terms of the actual loss suffered, this surely crosses that line.

596 A.2d at 710-11. Accord, *Medical Mut. Liab. Ins. Soc.* v. *B. Dixon Evander & Assocs.*, *supra* (Same underlying

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[13] *See supra* note 10.

facts as in *Alexander & Alexander*, with compensatory damages of $1,725,000. Punitive damages award of $7 million vacated and remanded for retrial).

Importantly, in reversing punitive damages awards as unconstitutionally excessive, *Alexander & Alexander* and *Medical Mutual* both emphasized that the harm arose out of a business tort, not involving loss of life or limb or threat to public health and safety. Thus, the court in *Alexander & Alexander* noted that "[t]his was, at bottom, a commercial dispute between two business competitors." 596 A.2d at 710. A different panel of that court similarly found that the "commercial dispute that triggered the awards of punitive damages was not 'very high on the scale of reprehensibility.'" *Medical Mutual*, 1992 Md. App. LEXIS 144, at *49 (quoting *Alexander & Alexander*).

That characterization, of course, applies equally to the instant case. This case involves slander of title to property; TXO did not "endanger the public health or safety [and] its conduct was not life-threatening to anyone." *Alexander & Alexander*, 596 A.2d at 711. Thus, even a ratio far lower than 526 to one is inconsistent with constitutional norms. The approval of this award by the West Virginia Supreme Court is simply indefensible.

Even where the underlying conduct has involved egregious personal injuries or public safety risks, courts have found awards in ratios much smaller than the 526-to-one ratio here to be excessive. In *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), for example, the jury awarded a total of $9,025,000 in compensatory damages and $25 million in punitive damages against the defendant, a producer of a carcinogenic substance that caused the plaintiff to develop and eventually die from leukemia. The jury found that the defendant knew or should have known of the dangers, and that it was wholly at fault for its negligent failure

to ensure adequate warnings. The court of appeals found that the $25 million punitive award, 2.77 times larger than the compensatory award, was so excessive as to "shock the judicial conscience." *Id.* at 1561. In so finding, the court found fault with the fact that the "staggering sum" of $25 million bore "no necessary relation to the actual harm caused." *Id.* (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The court remanded with directions to enter remittitur to one-half the award, $12,500,000. *Id.*[14]

Haslip has unquestionably received mixed reactions by the lower courts. It has rightly been interpreted by some to place meaningful limits on the relationship between punitive and compensatory awards. It also has been interpreted to permit virtually limitless punitive awards. In sum, the issue has been allowed to percolate long enough in the lower courts. This case represents an extraordinary example of an overly lenient approach to excessiveness review and therefore provides an excellent vehicle for the Court to give further guidance on the precise meaning of its holding in *Haslip*.

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[14] *General Motors Corp.* v. *Johnston*, *supra* note 10, was a product liability and wrongful death case brought when a defective engine in a brand-new Chevrolet truck stalled in an intersection, and a seven-year-old passenger was killed in the resulting collision. The evidence showed that General Motors knew of the defect, but did not notify any of its customers in order to avoid expending the substantial sums necessary to recall and replace the defective part. The jury awarded $15 million in punitive damages and $75,000 in compensatory damages, a ratio of 200 to one. *Id.* at 1057. The awards were reviewed and approved by the trial court in accord with the Alabama standards validated in *Haslip*. The trial court could "find no reported decision in Alabama where a defendant's conduct even approached the degree of reprehensibility of Defendant General Motors' conduct in this case." *Id.* at 1061. Yet, upon review, the Alabama Supreme Court held that a remittitur to one-half the punitive award, $7.5 million, was required, *id.* at 1064, because punitive damages "should not exceed an amount that will accomplish society's goals of punishment and deterrence." *Id.* at 1063.

3. In *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), this Court held that a newly announced rule of federal law may not be applied in a "selectively prospective" fashion. In other words, it is no longer permissible to extend the benefits of a newly declared federal rule to the litigants in the case announcing the rule, but not to those whose cases arose on facts predating the pronouncement. Rather, under such circumstances, the rule must be applied retroactively. *Id.* at 2448. The West Virginia Supreme Court's decision in this case is contrary to that principle. This Court should grant review to clarify that the holding in *James Beam* applies to a state court insofar as the state court is interpreting and applying federal law.

In *Garnes* v. *Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court first analyzed the West Virginia procedure for awarding punitive damages in light of this Court's decision in *Haslip*. Finding that procedure to be inadequate under federal law as enunciated in *Haslip*, the court announced new procedural guidelines to bring West Virginia's punitive damages scheme into compliance with federal law. 413 S.E.2d at 908. The litigants before the court in *Garnes* had not had the protection of those guidelines; accordingly, the West Virginia court remanded that case for a new trial to be conducted under the new federal constitutional requirements it had articulated. *Id.* at 910-11.

In this case, as well, TXO was not protected by the procedural guidelines held to be constitutionally required in *Garnes*. Yet, the West Virginia Supreme Court did not remand the case as it did in *Garnes*. The result of the application of federal due process law to TXO in the West Virginia Supreme Court was thus wholly at odds with what would have happened in a federal court.

This Court's decision in *Felder* v. *Casey*, 487 U.S. 131 (1988), indicates that the Constitution forbids this result, and requires state courts to apply the principles of

James Beam to state decisions announcing or implementing new rules of federal law. In *Felder* v. *Casey*, which involved a federal civil rights action under 42 U.S.C. § 1983, the government defendants asserted that the suit could not be entertained because the plaintiff had failed to comply with Wisconsin's notice-of-claim statute. 487 U.S. at 135-36. That statute provided that no action might be brought against any state officer unless the claimant had provided, within 120 days of the alleged injury, written notice of the claim and the relief sought. *Id.* at 136-37. On appeal, the Wisconsin Supreme Court agreed, and the case was dismissed. *Id.* at 137-38.

This Court reversed. Notwithstanding that "States may establish the rules of procedure governing litigation in their own courts," a " 'federal right cannot be defeated by the forms of local practice.' " *Id.* at 138 (quoting *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949)). The Court concluded that because enforcement of the provision "will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court," the notice-of-claim provision was unconstitutional. *Id.* at 138, 151.

The same reasoning must undermine the West Virginia Supreme Court's decision in this case that the procedural safeguards established as a matter of federal constitutional law in *Garnes* need not be retroactively applied. As *Felder* illustrates, it is impermissible for state procedural rules to burden a litigant's federal right. Surely the constitutional infirmity is even clearer where a state court's concern with judicial economy results in such a burden. See App., *infra*, 32a ("TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in . . . *Garnes* were not met. To adopt such an approach to *Garnes* would unnecessarily send far too many cases back for retrial."). The West Virginia court's analysis cannot be reconciled with *James Beam* and *Felder*, and certiorari should be granted in order for this Court to make clear

that the holding of *James Beam* is fully applicable in the state courts.

Moreover, at least one court has already taken a conflicting view of the mandated course for a state court where it has applied a new federal-law ruling to the litigants before it. In *Seyller* v. *Pierce & Co.*, 816 S.W.2d 577 (Ark. 1991), a supplier wishing to impose a materialman's lien for which he had not given prior notice invoked Arkansas's "commercial construction" exception to the statutory notice requirement for such a lien. The Arkansas Supreme Court had "recently held the commercial construction exception to the notice requirement unconstitutional on equal protection and due process grounds." *Id.* at 580 (citing *Urrey Ceramic Tile Co.* v. *Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991)). The court held that it was required, as a threshold matter, to "decide whether to apply *Urrey* retroactively to this case which was pending before us when *Urrey* was decided." *Id.* The Arkansas court recognized an obligation under *James Beam* that, having "applied a rule of law to the litigants in one case, it must apply the same rule of law to all other litigants not barred by procedural requirements or *res judicata*." *Id.*[15]

This Court should thus grant review in order to prevent an unconstitutional rift between state and federal courts in their approaches to retroactive application of rulings

[15] The Arkansas court found, however, that the case before it differed from *James Beam* because "appellants [were] barred by the procedural requirement of preserving an issue in the trial court for [Supreme Court] review." *Seyller* v. *Pierce & Co.*, 816 S.W.2d 577, 580 (Ark. 1991). It was thus on the basis that there was a procedural bar that the Arkansas court held it need not apply its earlier decision. *Id.* at 580-81. Here, of course, there is no procedural bar. TXO argued in its motion for judgment *n.o.v.* that it had been denied due process because of the absence of meaningful standards for the jury and the trial court. App., *infra*, 56a-69a. On appeal, TXO made the same argument to the West Virginia Supreme Court, which determined that the case need not be remanded. App., *infra*, 32a-33a.

on federal law. As the decision of the Arkansas Supreme Court in *Seyller* shows, review is also merited to prevent such a rift among the state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JANUARY 1992 TERM

No. 20281

TXO PRODUCTION CORP., A DELAWARE CORPORATION
LICENSED TO DO BUSINESS IN WEST VIRGINIA,
Appellant

v.

ALLIANCE RESOURCES CORP., A TEXAS CORPORATION LICENSED TO DO BUSINESS IN WEST VIRGINIA; TUG FORK LAND COMPANY, A WEST VIRGINIA CORPORATION; GEORGE KING, AN INDIVIDUAL; AND GROVER C. GOODE, AN INDIVIDUAL,
Appellees

Appeal from the Circuit Court of McDowell County
Honorable Booker T. Stephens, Judge
Civil Action No. 85-C-550

AFFIRMED

Submitted: March 10, 1992

Filed: May 14, 1992

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JUSTICE NEELY delivered the Opinion of the Court.

MCHUGH, C. J., and MILLER, J., concur and reserve the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state." *W. Va. Code*, 2-1-1 [1923].

2. Slander of title is actionable under West Virginia common law.

3. The elements of slander of title are:

   1. publication of
   2. a false statement
   3. derogatory to plaintiff's title
   4. with malice
   5. causing special damages
   6. as a result of diminished value in the eyes of third parties.

4. A tenant in possession under a lease is estopped to deny the title of his landlord.

5. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus Point 3 of *Walker v. Monongahela Power Company*, 147 W. Va. 825, 131 S.E.2d 736 (1963).

6. Attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title.

7. Admission of extrinsic acts evidence under Rule 404(b) of the *West Virginia Rules of Evidence* [1985] may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

8. Protection against unfair prejudice from evidence admitted under Rule 404(b) of the *West Virginia Rules of Evidence* [1985] is provided by: (1) the requirement of Rule 404(b) that the evidence be offered for a proper purpose; (2) the relevancy requirement of Rule 402—as enforced through Rule 104(b); (3) the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and, (4) Rule 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

9. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of dis-

cretion.' *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983)." Syllabus Point 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

10. "Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Syllabus Point 4, *Gable v. The Kroger Co.*, —— W. Va. ——, 410 S.E.2d 701 (1991).

11. "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admissions of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syllabus Point 5, *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987).

12. Petitions for review of punitive damages awarded before 5 December 1991 should address each and every factor set forth in syllabus points 3 and 4 of *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991) with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.

13. "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully

explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant."

Syllabus Point 3, *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991).

14. "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syllabus Point 4, *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991).

15. The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, must higher ratios are not *per se* unconstitutional.

Neely, J.:

In this case, TXO Production Corporation, a subsidiary of USX, knowingly and intentionally brought a frivolous declaratory judgment action against the appellees to clear a purported cloud on title. TXO's real intent, however, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease. Appellees counterclaimed alleging that TXO's actions were a slander of appellees' title. TXO now appeals the verdict against it for $19,000 in compensatory damages and $10,000,000 in punitive damages assigning three primary errors: (1) no cause of action for slander of title exists in West Virginia, and even if it does, the appellees did not prove the essential elements of slander of title at trial; (2) the circuit court erred in admitting testimony of lawyers involved in suits against TXO in other states to show plan, knowledge and intent in contravention of the *West Virginia Rules of Evidence*; and (3) the award of punitive damages in this case is a violation of due process as enunciated in *Haslip v. Pacific Mutual Life Ins. Co.*, —— U.S. —— (1991) and *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991). We find no reversible error in the lower court's conduct of the trial and, because appellant and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur. Thus, we affirm.

I.

This case centers in the oil and gas development rights to 1,002.74 acres in McDowell County known as the "Blevins Tract." Tug Fork Land Company manages the Blevins Tract. In 1984, Tug Fork leased the oil and gas development rights to George King, doing business as Georgia Fuels. Mr. King in turn assigned his lease to Alliance Resources Corporation, reserving an overriding royalty interest to Georgia Fuels.

In late 1984, TXO became interested in the oil and gas in the Blevins Tract and approached Brian Robin-

son, the president and chairman of the board of Alliance Resources, about purchasing Alliance's rights in the Blevins Tract. Mr. Robinson declined to sell Alliance's interest outright but did propose a joint venture in which TXO would pay 75 percent of the drilling costs and Alliance Resources would pay 25 percent. Under this arrangement, Tug Fork would receive a 12.5 percent royalty, Georgia Fuels would receive a 6.25 percent royalty, and Alliance Resources would receive a 1 percent royalty, for a total royalty burden of 19.75 percent. TXO and Alliance would then share an 80.25 percent working interest. TXO rejected this proposal.

Only a few months later, in February, 1985, however, TXO approached Mr. Robinson with a much better offer. TXO offered to pay all of the drilling costs, pay 22 percent in royalties, *and* pay Alliance $20 per acre for its interest in the Blevins Tract. Mr. Robinson accepted what he considered to be such a "phenomenal offer." [1]

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[1] The pertinent parts of the 2 April 1985 agreement state:

> The interest in said leases assigned Assignee hereunder shall be subject to such interest's proportionate part of the royalty interest as provided for in said leases and to the terms, conditions and provisions set forth therein. Such interest shall also be subject to such interest's proportionate part of all overriding royalties, production payments and any other payments and agreements of record.
>
> This Assignment is further made expressly subject to the following:
>
> (1) Assignor reserves unto itself, its successors and assigns, an overriding royalty interest equal to the difference between existing lease burdens and twenty-two percent (22%) of all of the oil, gas and other liquid or gaseous hydrocarbons produced and saved from or attributable to said leases during the terms thereof; provided, however, that the overriding royalty interest herein reserved shall be proportionately reduced if any of said leases do not cover a full mineral interest and/or this Assignment does not convey full leasehold rights in any of said leases. The overriding royalty interest reserved hereby shall bear its proportionate part of all production, severance or other similar taxes.
>
> (2) Assignor hereby warrants title to the extent that in the event of conducting title examination of the assigned acreage, Assignee's examining attorney determines that title has failed to all or any part of the assigned acreage, Assignor will reimburse to Assignee the consideration paid to it for any such lands to which title is determined to have failed.

TXO then retained the Ripley law firm of Skeen and Skeen to examine the title to the Blevins Tract. According to the title report prepared by the Skeens, there was a problem with a 1958 deed from Tug Fork to Leo J. Signaigo, Jr.[2] TXO's agent, Duncan Wood, then contacted Mr. Signaigo who told him that the 1958 deed did not include the transfer from Tug Fork to Mr. Signaigo of rights to the oil and gas. Nevertheless, shortly thereafter Mr. Wood approached Mr. Signaigo with a pre-printed affidavit for Mr. Signaigo to sign. The affidavit *falsely* stated that Mr. Signaigo could not say whether the oil and gas rights were included in the 1958 deed. The complete contents of the tendered affidavit are as follows:

> My name is Leo J. Signaigo, Jr. and I am involved in the coal business. On September 2nd, 1958, I purchased the coal and other minerals under certain tracts of real estate from Tug Fork Land Company. A copy of this deed is attached hereto and incorporated herein for all purposes. However, *there was no specific agreement on the part of myself or Tug Fork Land Company as to whether or not the oil and gas would be reserved by Tug Fork Land Company* in the attached deed, other than in the Pocahontas No. 3 and No. 4 coal seams. There-

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[2] Mr. Signaigo later conveyed his interest in the coal rights to Pocahontas Empire (now doing business as Hawley Coal Mining Corporation), which in turn conveyed its interest to Virginia Crews Coal Company.

fore, *I did not know whether or not the oil and gas was included in the conveyance to me* and as a consequence, after I purchased this mineral property. I was assessed for 1,002.74 acres, mineral or timber, Hensley Creek. *In the event Tug Fork Land Company would claim that we had a specific agreement that the oil and gas was not to be conveyed under any of the properties, I could not agree wtih such conclusions as there was not such a specific agreement.* Further affiant saith not. (Emphasis added.)

Because the affidavit was false, Mr. Signaigo refused to sign it.

The pertinent parts of the 1958 Signaigo deed state:

> 1. That for and in consideration of the sum of One ($1.00) Dollar, cash in hand paid, and other good and valuable considerations not herein set forth, the receipt and sufficiency of all of which is hereby acknowledged, the said party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty of title, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land, situate in Browns Creek District, McDowell County, West Virginia, together with the mining rights and privileges hereinafter set forth, but subject to the exceptions, reservations, stipulations and agreements hereinafter set forth, to-wit:
>
> [A description of the Blevins tract is included here.]
>
> * * * *
>
> 6. It is understood and agreed that there is excepted and reserved to the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

Although the deed does not demonstrate the most artful drafting, it does *clearly reserve all of the oil and gas under the Blevins Tract to Tug Fork Land Company.*[3] To make it perfectly clear why this Court so unequivocally finds that the deed was unambiguous, we include the entire deed as Appendix A.

Having decided that there was either a real or a contrived problem with title to the oil and gas, and still without having brought the potential problem to the attention of any of the appellees, TXO paid $6,000 to Virginia Crews (*see* note 2, *supra*) in exchange for a quitclaim deed that was recorded 11 July 1985. TXO told none of the appellees about any possible defect in title until *after* it had recorded its quitclaim deed.

After recording its quitclaim deed, TXO held a meeting on 14 or 15 August 1985 (the date is inconsistent in the record), attended by several of its employees, the title lawyer Mr. Larry Skeen, and Mr. Brian Robinson. The parties disagree about what occurred at this meeting.

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[3] According to Theodore M. Streit, Director, Oil and Gas Division of Environmental Protection, West Virginia Department of Commerce, Labor and Environmental Resources, a deed for the oil and gas underlying the Pocahontas 3 and 4 seams of coal would have been ridiculous in 1958. Gas wells are drilled much deeper than coal seams, and while modern gas recovery technology does, on occasion, lead producers to recover the methane imbedded in specific seams of coal, that would never have been done in 1958. Thus, any reading of the reservation clause which would imply that the grantor reserved only the oil and gas within the Pocahontas 3 and 4 seams of coal would have been ridiculous and contrary to all custom and usage at the time the deed was executed.

Mr. Robinson testified that during this meeting, Mr. Skeen very aggressively explained to him why the lease by Alliance Resources was not valid under West Virginia law. Mr. Robinson also testified that TXO asked for concessions and that TXO threatened to file suit if the appellees did not make concessions on the royalties. On the other hand, Mr. Skeen testified that, although "[he did not] remember what all we went over," he did not tell Mr. Robinson that Alliance didn't have title. Mr. Wood, a TXO landman, testified that TXO did not ask for any concessions on royalties at this meeting.

In the case before us no one disputes that before beginning to drill, any reasonable businessman would want to clear up any clouds on the title to the oil and gas rights, no matter how small. Therefore, we understand that before investing hundreds of thousands of dollars in an exploratory well on the Blevins Tract, TXO would have wanted to fork out $6,000 for an insurance policy against litigation in the form of a quitclaim deed. However, instead of clearing the title directly by making the grantee of the quitclaim Tug Fork or approaching the appellees to discuss the title problem, TXO attempted to use the purported cloud as leverage for increasing its interest in the oil and gas rights.

Shortly after the 14 or 15 August meeting, on 23 August 1985, TXO filed its action for a declaratory judgment to quit title. The appellees counterclaimed alleging slander of title. The circuit court then bifurcated the issues for trial. In the declaratory judgment action, the circuit court found the terms of the 1958 deed from Tug Fork to Mr. Signaigo to be clear and unambiguous and held that title to the oil and gas was vested in Tug Fork as leased to Alliance Resources through George King. On the counterclaim, a jury awarded appellees $19,000 in compensatory damages and $10,000,000 in punitive damages.

II.

A.

TXO argues that there is no action for slander of title in West Virginia. Although there is no West Virginia case on record directly recognizing an action for slander of title, the *West Virginia Constitution*, Article VIII, Section 13, provides:

> Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

Also, *W. Va. Code*, 2-1-1 [1923] provides:

> The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state.

Interpreting these provisions, we stated in Syllabus Point 2 of *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979):

> Article VIII, Section 13 of the West Virginia Constitution and W. Va. Code, 2-1-1, were not intended to operate as a bar to this Court's evolution of common law principles, included its historic power to alter or amend the common law.

Although we recognized the ability of this Court to alter and amend the common law in *Morningstar*, we certainly did not imply that the common law was in any way abrogated as it stood. Quite to the contrary, the *West*

Virginia Constitution commands that we recognize the English common law as of 1863.[4] Recognizing this fact, we now look to the common law.

Slander of title long has been recognized as a common law cause of action. Indeed, the slander of title cause of action was especially important 400 years ago when many transfers of land were oral transfers (i.e., feoffment with livery of seisin), and when, the Domesday Book notwithstanding, land records were much less complete than they are today. In the 32nd and 33rd years of Elizabeth I (c. 1591), the Queen's Bench found for the plaintiff on a claim of slander of title in *Gerrard against Dickenson*, 78 Eng. Rep. 452. Although 400 years old, *Gerrard* has some similarities to the case before us. The defendant claimed that she had a lease on the land of the plaintiff, which she did not have. The defendant offered several objections, but the court found for the plaintiff.

Later, in the 5th year of James I (c. 1608) the King's Bench also found for a plaintiff on a slander of title claim in *Earl of Northumberland against Byrt*, 79 Eng. Rep. 143. In *Byrt*, the defendant falsely said that the previous owner of the land in question had made a lease of it before his death. The defendant also claimed that the lease had then been conveyed to him. The court found this actionable as slander of title and held for the plaintiff. Examining these cases, it is clear that an action for slander of title has been a part of English common law for at least 400 years.

The one possible defense for TXO that these cases raise, however, is that "if a man claim estates [as his own], although they be false he shall not be punished." *See Pennyman against Rabanks*, 78 Eng. Rep. 668 (c.

[4] The common law in effect in West Virginia is traditional English common law, as amended by the Virginia legislature prior to 1863 and as amended by the West Virginia legislature.

1596). TXO maintained strenuously at oral argument that only allegations that title is held *by a third party* are actionable and that a person cannot slander title by asserting title in himself. Originally, falsely claiming title for oneself was not actionable as slander of title. However, at least by the end of the 16th century, the English courts had begun to do away with the distinction between claiming title in oneself and alleging the superior title of another. As discussed *supra*, unrecorded conveyances were much more important 400 years ago and the courts, therefore, sought to protect those who asserted unrecorded conveyances to themselves. In *Pennyman*, for example, the court stated:

> This was agreed by all the Court, that no action lay against one for saying, that he himself had title or estate in lands, &c. although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title.—Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shown upon the third day of the next term.[5]

A distinction between claiming title in oneself and claiming title in another arises for a logical reason. Although we want to discourage people from slandering the title of others, we do not want to discourage people from making legitimate (though possibly weak) claims of their own. Therefore, we also distinguish between cases in which the claimant legitimately raises questions of title in himself and cases in which the claimant raises

[5] First stating the rule and then neatly side-stepping it, the Court of Common Pleas demonstrates that judicial double talk was not pioneered in the 20th century.

his own claim without any reasonable grounds. Although the courts of the 16th and 17th centuries had not yet clearly enunciated this distinction, they did follow it. The courts circumvented the general rule whenever the defendant had not acted in good faith. Consider *Gerrard*, *supra*, in which the defendant falsely claimed a lease on land as her own. Notwithstanding the defendants' objection that she could not slander title by claiming it in herself, the court found for the plaintiff because the defendant relied on a deed that she knew had been forged. When, therefore, a defendant knows that his claim is false, he cannot rely on the defense of claiming title in himself.

Because of the *West Virginia Constitution*'s incorporation of the common law of England, we find that an action for slander of title could always be brought in West Virginia.[6] We also find that claiming title in oneself without any reasonable basis can give rise to a claim for slander of title.

B.

The *Restatement (Second) of the Law of Torts* (1977) provides the guidelines that modern courts generally follow in identifying the elements of slander of title. *Restatement (Second) of the Law of Torts* § 623A (1977) provides:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

[6] The Fourth Circuit Court of Appeals has also determined that slander of title is a recognized cause of action in Virginia. *See Lomah Elect. Targetry v. ATA Tr. Aids Assist. Pty.*, 828 F.2d 1021 (4th Cir. 1987).

> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Restatement (Second) of the Law of Torts § 624 (1977) provides:

> The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property.

From the Restatement, we can deduce the elements of slander of title:

1. publication of
2. a false statement
3. derogatory to plaintiff's title
4. with malice
5. causing special damages
6. as a result of diminished value in the eyes of third parties.

See also W. P. Keeton, Prosser and Keeton on Torts (5th ed. 1984 at § 128); *Williams v. Burns*, 540 F.Supp. 1243 (D. Colo. 1982). Although perhaps more neatly set out, these are the same elements required at least as far back as *Gerrard* in 1591.

C.

The jury found that by recording a quitclaim deed which it knew to be frivolous, TXO satisfied the requirements for slander of title. TXO argues that recording a quitclaim deed cannot be construed as the publication

of a frivolous statement with the intent to prevent others from dealing with the claimant as required for an action for slander of title. We disagree. Recording a quitclaim deed that one knows to be frivolous is no different from saying to a potential purchaser—"I don't think you should buy that land. You know there is a cloud on the title because of Mr. Signaigo's old deed." Therefore, we agree with the Supreme Court of Montana which stated in a slander of title action in *Jumping Rainbow Ranch v. Conklin*, 538 P.2d 1027, —— (Mont. 1975):

> [T]he action of [the defendant] in filing his quitclaim deed was such as to warrant the necessary showing of malice to entitle plaintiff to punitive damages.

As a general rule, courts have found that wrongfully recording an unfounded claim to the property of another is actionable as slander of title. *See, e.g.*, Annotation, "Recording of Instrument Purporting to Affect Title as Slander of Title," 39 A.L.R.2d 840, and cases cited therein. This is so provided that the other elements for slander of title, namely malice and special damages, are present.

Even if (unlikely as this may be) the circuit court had found that there was a legitimate cloud on the title because of the deed to Mr. Signaigo, TXO (as an expert in all aspects of land law) undoubtedly knew that a tenant in possession under a lease is estopped from denying the title of his landlord. *See* Trial transcript at 614 (testimony of TXO's agent, Duncan Wood, confirming, in a general way, that he was aware at the time that such a rule existed.) As we said in *Voss v. King*, 33 W. Va. 236, 239, 10 S.E. 402, —— (1889):

> [A] tenant in possession under a lease is not permitted to dispute the title of his landlord. This as a general principle of law is well settled both in England and in this country.

Although it has been a number of years since we have addressed the issue, the well-settled general rule is still that:

> [D]uring the existence of the relation of landlord and tenant, the tenant is estopped to deny his landlord's title. 49 Am. Jur.2d Landlord and Tenant § 109 (1970).

If, however, an honest mistake had arisen and TXO had mistakenly taken the quitclaim deed from Virginia Crews in its name instead of Tug Fork's name (but had not filed a suit against the appellees to challenge the title of TXO's own landlord while still in possession and claiming under the lease), the counterclaim for slander of title would never have arisen. Certainly, a jury would not have found malice in TXO's actions.

At trial, and again on appeal, TXO argued that there was no malice in its actions, and that the filing of the false quitclaim deed was the result of a good faith mistake. However, after the testimony about TXO's efforts to reduce royalty payments and much testimony about previous similar bad acts by TXO (*see*, Section III, *infra*), the jury found the requisite malice. The testimony regarding the August meeting is conflicting, and when we examine conflicting testimony, we look to Syllabus Point 3 of *Walker v. Monongahela Power Company*, 147 W. Va. 825, 131 S.E.2d 736 (1963), where we stated:

> In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.

Furthermore, TXO's employee, Duncan Wood, testified that TXO never made a request to Alliance for simple reimbursement of the expenses in acquiring the quitclaim

deed. *See* Trial transcript at 618. This leads to the logical inference that TXO's real intent was to negotiate substantially lower royalties with appellees, thus reducing the market value of the appellees' interest in the lease in the eyes of any prospective third party purchasers. Therefore, we take Mr. Robinson's version of these events as accurate.

Not only do the details of the August meeting as related by Mr. Robinson suggest malice on the part of TXO, but the facts of Mr. Woods' dealings with Mr. Signaigo also show unsavory and malicious practices by TXO. When examined in the light most favorable to the appellees, the evidence clearly shows that TXO intentionally and maliciously recorded a quitclaim deed that *it knew to be without any basis in fact* because Mr. Signaigo explicitly told TXO that he had not bought the oil and gas on the Blevins Tract in 1958. Furthermore, the record shows that this was not an isolated incident on TXO's part—a mere excess of zeal by poorly supervised, low level employees—but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power *vis á vis* TXO's superior legal firepower.

TXO argues that the $19,000 in attorneys' fees incurred by the appellees in defending against TXO's suit to remove the cloud from appellees' title are not special damages. Ordinarily, attorneys' fees are not considered damages. However, slander of title is a special case. The appellees spent $19,000 responding to TXO's declaratory judgment action that the appellees would not have spent if TXO had not filed the false quitclaim deed and then sued the appellees in an attempt to steal their land. We follow the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title. *See, e.g., Rayl v. Shull Enterprises, Inc.*, 700 P.2d 567 (Idaho 1984); *Summa Corp. v. Greenspun*, 655

P.2d 513 (Nev. 1982); *Paulson v. Kustom Enterprises, Inc.*, 157 Mont. 188, 483 P.2d 700 (1971); *Dowse v. Doris Trust Co.*, 116 Utah 106, 208 P.2d 956 (1949); *Chesbro v. Powers*, 78 Mich. 472, 44 N.W. 290 (1889); *Den-Gar Enterprises v. Romero*, 94 New Mexico 425, 611 P.2d 119 (Ct. App. 1980), *cert. denied*, 94 New Mexico 628, 634 P.2d 545 (1980). *See also Restatement (Second) of the Law of Torts*, § 633 (1977).[7]

III.

A.

TXO's second group of assignments of error involve the introduction, as part of appellees' case in chief, of certain testimony about prior bad acts perpetrated by TXO. One of TXO's defenses at trial was good faith or the lack of malice. The appellees introduced testimony by four lawyers, under Rule 404(b) of the *West Virginia Rules of Evidence* [1985], to help establish a lack of good faith by TXO. TXO claims that the introduction of this evidence was a violation of Rules 404(b), 402, 403 and 802 of the *West Virginia Rules of Evidence* [1985].

The testimony at issue are the videotaped depositions of R. H. Madden, III, a Ruston, Louisiana lawyer; Clar-

[7] Section 633 states:

(1) *The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to*

(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and

(b) *the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.*

(2) This pecuniary loss may be established by

(a) proof of the conduct of specific persons, or

(b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify. (Emphasis added.)

ence Bufford Harrison, Jr., a Richardson, Texas lawyer; James P. Pruitt, a lawyer from Dallas and, Allan DeVore, a lawyer from Oklahoma City. The circuit court thoroughly examined each of these depositions before trial and excluded some parts of the testimony to which TXO had objected.

Mr. Madden testified about litigation that he initiated against TXO for his client Carrie Calloway. Ms. Calloway is an elderly, functionally illiterate woman who lives in Louisiana. Her son contacted Mr. Madden because he believed that TXO was taking gas from his mother's land without paying her for it. Near the end of February, 1988, Mr. Madden contacted John Wright in TXO's Shreveport office and informed him that he was representing Ms. Calloway. Mr. Madden testified that on 4 March 1988, David McDonald and Kevin Treadway, representatives of TXO, came to Ms. Calloway's house to discuss her interest in the gas TXO had been producing. Ms. Calloway told the TXO representatives that they should contact Mr. Madden. However, the TXO representatives told Ms. Calloway that neither she nor they needed to talk to Mr. Madden, and that all she needed to do was sign some papers or else her neighbors could not continue to receive their royalty payments. Not wanting to prevent her neighbors from receiving money that was rightfully theirs, Ms. Calloway signed the tendered document. Ms. Calloway could not read this document and the TXO representatives did not leave her a copy of it. Ms. Calloway told Mr. Madden that the gentlemen were at her house about 1:00 p.m. on 4 March 1988. At 2:21 p.m. that same day, a lease (which was the tendered document) was filed in the local clerk of court's office. Subsequently, TXO settled the case favorably to Ms. Calloway.

Mr. Harrison testified about some wells in Texas in which he owned an interest. He testified that TXO had

been producing from his wells for almost a year without paying him any royalties. He stated:

> They had given us a list of excuses a mile long of why they hadn't paid. *One of them was we don't know if the title's good to the tract. Well, our tract was where the well was located and that title was cured before the well was drilled.*
>
> Well, they gave us excuse after excuse after excuse. When we got the bill we figured they owed us 150 or $200,000. And our part of the frack job was about $50,000, so we figured since they owed us more than we owed them we weren't going to pay them.
>
> Never forget one day my partner, I was in his office, and he was registered agent for the company and a lawyer from TXO called and said we are going to sue you for that $50,000. And he said, well, good. And the comment from the lawyer on the other end of the phone was, you don't seem too upset. And he said, well, you're going to look awful silly suing us for 50,000 when you owe us 200,000. The lawyer then got a little bit upset about that and decided to go ahead and pay.

Trial transcript at 265 (Emphasis added.)

Mr. Harrison also testified that, in another case, TXO under-reported the gas it had produced from a well, and therefore failed to pay the royalties it should have paid.

Mr. Pruitt, an oil and gas lawyer, testified about litigation he had instituted (personally and on behalf of clients) against TXO in 1984. After investigating the situation, Mr. Pruitt discovered that TXO had been paying minimal shut-in royalties to him and others, when in fact, TXO had been producing out of his well and other

wells.[8] Shortly after the lawsuit was filed, Mr. Pruitt testified, TXO settled the case.

Mr. DeVore testified about some ongoing litigation in Oklahoma. He had examined depositions, discovery requests, interrogatories and other documents in the office of the county clerk where the litigation was taking place. He explained that there was a tract of land on which TXO wanted to drill. Under Oklahoma law, there was a procedure through which any owner of land within a tract could gain drilling rights. TXO initiated this procedure, although it did not own any of the land. In essence TXO sent a letter to a group of landowners saying TXO was going to drill a well and individual landowners could either get in on it or not. However, TXO had no right to drill without the landowners' permission, and no right to send this letter. Through this questionable tactic, TXO was able to acquire an interest from one of the existing owners, and by acquiring this interest through fraud and misrepresentation, go on to drill the well it had threatened to drill.

Mr. DeVore also testified about a pending cast, *Freede v. Texas Oil and Gas Corp. and TXO Production Corp.* From the court documents available to him (or to any other member of the public), Mr. DeVore testified that he *thought* "that TXO had violated the rights of Dr. Freede and hundreds or thousands of other people across the nation, as a result of this willful, wanton action." Trial transcript at 315. He also explained the details of the then-pending lawsuit by Dr. Freede. After the trial of appellees' case here in West Virginia, however, an Oklahoma jury *found for TXO* in the case brought by Dr. Freede.

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[8] In many oil and gas contracts, the producer (in this case, TXO) agrees to pay a minimum royalty to the landowner even when the well is not producing. These are called shut-in royalties.

B.

TXO argues that all of the testimony discussed in subsection A above should have been excluded under Rule 404(b) of the *West Virginia Rules of Evidence* [1985]. Rule 404(b) of the *West Virginia Rules of Evidence* [1985] provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Huddleston v. U. S.*, 485 U. S. 681 (1988), the U. S. Supreme Court discussed the admission of "other acts" evidence under Rule 404(b) of the *Fed. R. Evid.* The Court held that "other acts" evidence need not be proved by a preponderance of the evidence before it can be submitted to the jury. The Court stated:

> "[S]uch evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."

Id. at 685.

The Court also stated:

> "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, *especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.*" *Id.* (Emphasis added.)

The Court held that the first inquiry a trial court must make is whether the proffered evidence is probative of a material issue other than character. The Court also found that protection against unfair prejudice emanates from four sources:

> [F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . . and fourth, from *Fed. R. of Evid.* 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted . . . .

Id. at 691-92.

We find the U. S. Supreme Court's reasoning in *Huddleston* persuasive and we here use its analysis to examine the admission of the other acts evidence in the case before us. Examining the first requirement, the testimony was offered in this case to prove malice, which is a necessary element in an action for slander of title. TXO strenuously maintained at trial that no matter how the facts appeared in this case, it had simply made a good faith mistake. The appellees offered their evidence of other evil acts to disprove TXO's good faith defense and to show that this case was but part of a pattern and practice of deception and chiseling by TXO.

For the second requirement, we look to Rules 401 and 402 of the *West Virginia Rules of Evidence* [1985]. Rule 401 of the *West Virginia Rules of Evidence* [1985] provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 of the *West Virginia Rules of Evidence* [1985] provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of West Virginia, these rules, or other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.

The proffered evidence was clearly relevant to the issue of malice. Furthermore, as we stated in Syllabus Point 2 of *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983):

> "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, [171 W. Va. 623], 301 S.E.2d 596, 599 (1983)."

For the third requirement, we look to Rule 403 of the *West Virginia Rule of Evidence* [1985] which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

And we recently stated in *Gable v. The Kroger Co.*, —— W. Va. ——, ——, 410 S.E.2d 701, 705 (1991):

> Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice to the defendant. Such decisions are left to the sound discretion of the trial judge . . . .

In this case, we find that the trial judge was correct in holding that any unfair prejudice to TXO did not substantially outweigh the probative value of the testimony.

Fourth, TXO did not request a limiting instruction regarding the other acts testimony. Therefore, we find this other acts evidence was appropriately admitted under Rule 404(b) of the *West Virginia Rules of Evidence* [1985].

TXO makes particular note of the testimony by Mr. DeVore about the *Freede* case from Oklahoma because that case was subsequently won by TXO.[9] The fact that a jury found for TXO in *Freede* does not mean that any of the particular facts to which Mr. DeVore testified is untrue. More importantly, TXO had an opportunity to cross-examine Mr. DeVore, and also had an opportunity to put on testimony of its own to contradict Mr. DeVore. Furthermore, we find that, given the weight of the other testimony, any error in admitting Mr. DeVore's testimony about the *Freede* case was harmless.

C.

More problematic than TXO's vociferous objections to admission of all of this testimony under Rule 404, is that particular parts of this testimony were based on hearsay. *West Virginia Rule of Evidence* 801(c) provides:

> (c) *Hearsay.*—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

West Virginia Rule of Evidence 802 provides:

> Hearsay is not admissible except as provided by these rules.

Apparently, at the deposition, appellees' attorney offered this testimony believing it to be protected by the hearsay exception codified in Rule 803(6) of the *West*

[9] Well, even a blind hog finds an acorn now and again.

Virginia Rules of Evidence [1985]. Rule 803(6) of the *West Virginia Rules of Evidence* provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Most jurisdictions have held that this exception is applicable only when the hearsay declarant is under a business duty to provide the information. *See, e.g., United States v. Bortnovsky*, 879 F.2d 30 (2nd Cir. 1989); *Ramrattan v. Burger King Corp.*, 656 F.Supp. (D. Md. 1987); *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F.Supp. 1049 (W.D. Mo. 1985); and *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F.Supp. 1257 (N.D. Ohi) 1980). In the case before us, the out-of-court declarants were *not under a business duty* to provide the information. However, we need not decide the admissibility of the testimony under the business records exception because the testimony is admissible under Rule 803 (24) of the *West Virginia Rules of Evidence* [1985].

The purpose of excluding hearsay testimony at trial is to prevent unreliable information from reaching the jury. Because not all statements that are hearsay as defined by Rule 801(c) of the *West Virginia Rules of Evidence* [1985] are unreliable, we have incorporated a number of specific traditional common law hearsay exceptions (such

as the business records exception) into Rules 803 and 804 of the *West Virginia Rules of Evidence* [1985]. Rules 803(24) and 804(b)(5) also provide "catch-all" exceptions to cover other reliable hearsay statements.

Rule 803(24) of the *West Virginia Rules of Evidence* [1985] provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Interpreting Rule 804 (b)(5) of the *West Virginia Rules of Evidence* [1985], the counterpart to Rule 803 (24) of the *West Virginia Rules of Evidence* [1985], in Syllabus Point 5 of *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987), we stated:

> The language of Rule 804(b)(5) of the *West Virginia Rules of Evidence* and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admissions of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

As we stated in *Smith*, our major concern with any evidence admitted under this exception is its reliability. We find the hearsay statements within the testimony of the four lawyers both credible and reliable. The hearsay statements were made about specific people, places and events—all of which TXO controlled the evidence to controvert, if the witnesses' statements were not true. For instance, Mr. Madden testified about a specific day and time on which specific TXO employeees went to visit Ms. Calloway and how TXO committed specific acts. TXO could have called its own employees, and Ms. Calloway for that matter, to disprove the statements, but it chose not to do so.

Second, as we explained above, this evidence is clearly probative of the material issue of whether TXO acted with malice.

Third, because of the concise manner in which the evidence was presented, because of the ease with which any untrue testimony could have been impeached, and because of the difficulty of appellees' obtaining any other evidence on this material issue, we find that these statements were more probative than any other evidence that the appellees could have reasonably procured.

Fourth, the admission of these statements comports with the general purpose of the *West Virginia Rules of Evidence* [1985] and the interests of justice.

Fifth, TXO clearly had more than adequate notice that these statements were going to be offered at trial. The hearsay statements were not offered live, but in previously prepared videotaped depositions. TXO was represented by its lawyers at each of these videotaped sessions. If there were any evidence available to rebut the statements made by these four witnesses, TXO had more than ample and fair opportunty to provide that evidence. Thus, to the extent that appellees attempted to show the jury where TXO's victims' bodies were buried, each body allegedly buried was meticulously marked by time of death and tombstone location well in advance of trial.

Therefore, we find that the trial court did not abuse its discretion in admitting the "other acts" evidence under Rule 404(b) of the *West Virginia Rules of Evidence* [1985], and that the hearsay statements within this testimony were admissible under Rule 803(24) of the *West Virginia Rules of Evidence* [1985].

IV.

TXO finally asks that we set aside the punitive damages award. The first issue that we must consider in this regard is the applicability of *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E. 2d 897 (1991) to those cases still on appeal that were decided before we handed down our decision in *Garnes*. TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in syllabus points 3 and 4 of *Garnes* were not met. To adopt such an approach to *Garnes* would unnecessarily send far too many cases back for retrial. We will, however, be especially diligent in our review of any punitive damages awards entered before *Garnes* was decided. We adopt this flexible approach to *Garnes* because we have already held that petitions for review of punitive damages awarded before 5 December 1991 must:

> "Address each and every factor set forth in syllabus points 3 and 4 of [*Garnes*] with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage."

Syllabus point 5, *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991).

In Syllabus Point 3 of *Garnes*, we stated:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that

the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

In Syllabus Point 4 of *Garnes*, we stated:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuit pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

We set out these guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*, *supra*. Just as we recognized in *Garnes* that there can be no mathematical bright line relationship between punitive damages and compensatory damages, we cannot simply examine these nine criteria seriatim, awarding a certain number of points to each. The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards.

Originally, punitive damages were awarded only to deter malicious and mean-spirited conduct. However, the punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm.[10] Generally, then, we can distinguish between the "really mean" punitive damages defendant, and the "really stupid" punitive damages defendant. We want to discourage both forms of unpleasant conduct, but not necessarily with the same level of punitive damages.

Although there is no mechanical mathematical formula to use in all punitive damages cases, we think it appropriate here to offer some broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages.

We have examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable. Generally, the cases fall into three categories: (1) really stupid de-

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[10] Even if Ford Motor Company had not intentionally left gas tanks in the wrong position on its Pinto automobile, we would still want to allow high levels of punitive damages against Ford in order to encourage Ford to make reasonable efforts to insure that bureaucratic bungling and red tape would not lead to the deaths of consumers. *See, Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d, 174 Cal. Rptr. 348 (1981).

fendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.[11]

By really stupid defendants, we signify those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness—in most cases caused by a foul-up in the middle of some corporate bureaucracy that has pushed some victim into a red-tape limbo. Consider, for example, *Principal Financial Group v. Thomas*, 585 So.2d 816 (Ala. 1991), *cert. denied* —— U.S. —— (1991), in which an insurance company spent tens of thousands of dollars at trial and on appeal to defend its failure to pay $1,000 to a mother who had lost her child. The insurance company claimed that the child was not really a dependent of the mother. Outraged at the insurance company's conduct, the jury awarded not only $1,000 in compensatory damages, but also $750,000 in punitive damages. The Supreme Court of Alabama (whose review procedure was endorsed by the U.S. Supreme Court in *Haslip, supra*) upheld the verdict.

As we discussed in *Garnes*, one of the reasons we allow punitive damages in these "stupid" cases is to give individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants. In a world with only smaller, closely held businesses, we would not need punitive damages for this type of case. Once Joe, the owner of Joe's Automobile Company, realizes that there is a foul up in his business that is causing problems for his customers, he has plenty of incentive to correct it. However, compensatory damages do not always provide sufficient

[11] See our tables of cases in Appendix B. Although it is sometimes difficult to distinguish between the mean cases and the stupid cases just by reading the appellate opinion, we have given it our best efforts. For example, if we tried to place the *Thomas* case, discussed *infra*, into a category, we could have called it a mean case or we could have said that it was only the worst case of bureaucratic bungling in history.

incentive for the middle managers who make these types of decisions for a major automobile company with hundreds of thousands of employees and agents. As we noted in discussing claims against insurance companies in *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986).

> Unfortunately, in the business of claims settlement we do not have simply two parties—the company that wishes to pay the lowest legitimate amount of money and the policyholder who wants maximum benefits under the policy. Between these two profit-maximizing, rational players, there is an entire corporate bureaucracy composed of agents, administrators, corporate counsel, and local litigating lawyers. This bureaucracy is neither inherently good nor inherently evil, and it performs a necessary function in the insurance industry. Nonetheless, the claims settlement bureaucracy is subject to the same dynamics as every other bureaucracy known to man: its natural tendency is to maximize upward mobility for middle management members of the bureaucracy and to augment the work that the bureaucracy is responsible for doing. In government, this phenomenon is often referred to as "turf protection." The extent to which pernicious dynamics prevail in any particular company's claims bureaucracy differs from company to company and from office to office within the same company. However, a policyholder who runs into an intransigent or unreasonable claims settlement bureaucracy is destined to be sorely put upon.

The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.) The possibility of punitive damages, however, increases the possibility of a higher payout. The higher the potential payout, then, the further up the corporate hierarchy the

decision is passed. A reasonable level of punitive damages therefore increases the likelihood that settlement decisions will be made by upper management employees who own stock in the company or who at least feel a higher level of fiduciary duty to the stockholders.

By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful. For example, in *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), which we discussed in *Garnes*, the defendant insurance company failed to pay Ms. Eichenseer's obviously *legitimate* claim. Ms. Eichenseer was subjected to numerous "misinterpretations" of her claim as well as the "loss" of her medical records. Furthermore, the insurance company made no effort to pay Ms. Eichenseer's claim until *after* she filed her lawsuit. The Fifth Circuit then upheld punitive damages 500 times the compensatory damages.

We cannot say that our examination of post-*Haslip* cases has led us to a crystal clear bright line rule. Not surprisingly, some courts have been less willing than this Court in *Garnes* to take seriously the U.S. Supreme Court's guidance. We do find a pattern, however, of what we believe are reasonable verdicts under the *Haslip* and *Garnes* standards.

In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large (*see* our discussion of those terms in *Hayseeds, supra*) we hold that the outer limit of punitive damages is *roughly* five to one.

This is not necessarily the case, however, when compensatory damages are minimal. In cases such as *Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991), in which the potential for harm from the defendant's conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a

ratio much greater than five to one were entirely appropriate.[12]

When the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant. For instance, the United States Supreme Court upheld a punitive damages award with a ratio of more than 117 to 1 in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In the really mean cases, the cynosure in determining the reasonableness of the jury's verdict under *Haslip* and *Garnes* is the amount of punitive damages required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct.

Accordingly, we find that in cases where the defendant has intentionally committed mean-spirited and harmful acts (especially when the provable compensatory damages are small, but the potential of harm is great), even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*. The appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention because, as we said in *Garnes*, an award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's. *See Garnes* at —, 413 S.E.2d at 910.

In applying the Garnes "reasonable relationship" test to the case before us, we look to: (1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to

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[12] Concomitantly, if the compensatory damages are very high then punitive damages even in the ratio of 5:1 might be excessive. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (compensatory damages of $9.025 million; punitive damages remitted to $12.5 million from $25 million).

discourage TXO from undertaking such endeavors in the future. The type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit.

TXO also argues that the jury were allowed to consider irrelevant financial information under the fifth criterion from Syllabus Point 3 of *Garnes*. By interrogatory, appellees attempted to find out about the finances of TXO Production Corp.[13] Because the appellees were unable to obtain information about the worth of TXO Production Corp. from TXO, the appellees provided their own expert to testify about the worth of the TXO Division of USX. Using public financial statements for USX, the expert testified that the net worth of the TXO Division of USX was between $2.2 billion and $2.5 billion. TXO argues that because the TXO division is "comprised of at least 15 corporate entities in addition to TXO Production Corp." (Appellant Brief at 37), the introduction of this testimony was unfairly prejudicial.

First, TXO was not forthcoming during discovery with information about the worth of TXO Production Corporation, nor did TXO offer such evidence at trial. Furthermore, even lingering on this point obscures the more important issue. The worth of the TXO Division of USX, and the worth of USX for that matter, is relevant. If we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporat-

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[13] Appellees 4th Set of Interrogatories Nos. 5, 6 and 7, along with TXO's answers are as follows:

5. State the name and address of the stockholders of TXO Production Corp.

ANSWER: Texas Oil & Gas Corp.—owns 100% of outstanding stock.

1700 Pacific Avenue
First City Center
Dallas, Texas 75201

6. Since 1980 to present has TXO Production Corp. filed a separate corporate tax return?

ANSWER: No.

7. Since 1980 have the profits and/or losses of TXO Production Corp. been subsumed in or as a part of income tax returns of another corporation?

ANSWER: Not sure of term "subsumed". Dictionary definition would not appear to apply. If by term it is meant made part of or incorporated into parent company, the answer is yes.

If so,

(A) State the name and address of any corporation in which the profits and/or losses of TXO Production Corp. were subsumed, and the year or years in which each such corporate entity has subsumed the profits and/or losses of TXO Production Corp.

ANSWER: 1980-86—Texas Oil & Gas Corp.
1986-Present—USX Corporation
600 Grant Street
Pittsburgh, PA 15230

(B) Defendant requests plaintiff produce copies of each of the above tax returns since 1980 in which the profits and/or losses of TXO Production Corp. have been incorporated and attach the same with your answers hereto.

ANSWER: Objection. The returns are too large and burdensome to copy and include. Moreover, they also combine the income and losses of a number of other companies (subsidiaries), but are not broken down on the returns by subsidiary and TXO's profit or loss could therefore not be determined by a review of such returns. Nothing short of a full audit at extreme expense could answer interrogatory which TXO is not prepared to do at its own cost.

ing separate departments as a number of undercapitalized subsidiaries. It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury verdict must reach.[14] Consequently, we find that the punitive damages awarded in this case were not so unreasonable as to demonstrate such passion and prejudice that a new trial is warranted.

V.

The jury in this case correctly found willful and deliberate injury. Accordingly, the judgment of the Circuit Court of McDowell County is affirmed.

Affirmed.

[14] When pressed at oral argument, TXO's counsel admitted that USX has the power to: 1) elect the Board of Directors, 2) appoint all officers through the Board, and 3) generally control the operations of TXO Production Corp. Indeed, it is undisputed that at the end of the chain of related companies, TXO has but one stockholder, to-wit USX.

APPENDIX A

THIS DEED, made and entered into this the 2nd day of September, 1958, by and between TUG FORK LAND COMPANY, a West Virginia corporation, party of the first part, and LEO J. SIGNAIGO, Jr., party of the second part.

WITNESSETH:

1. That for and in consideration of the sum of One ($1.00) Dollar, cash in hand paid, and other good and valuable considerations not herein set forth, the receipt and sufficiency of all of which is hereby acknowledged, the said party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty of title, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land, situate in Browns Creek District, McDowell County, West Virginia, together with the mining rights and privileges hereinafter set forth, but subject to the exceptions, reservations, stipulations and agreements hereinafter set forth, to-wit:

PARCEL NO. 1: That certain tract or parcel of real estate on upper Hensley Branch, McDowell County, West Virginia, more particularly bounded and described as follows:

BEGINNING at a spruce pine on a spur about 300 feet West of Upper Hensley Branch, and 500 feet from Tug River, a corner of the Alex Trent 50½ acre tract; thence by a line running in a northeasterly direction parallel with and 20 feet below the outcrop of the Davy seam of coal, 2050 feet to a point in a line of the Alex Trent 50½ acres; thence with a part of one line of the A. Trent 50½ acres, S. 19 W. 1040 feet to a fallen spruce pine and maple; thence with one line of the A. Trent 50½ acres, S. 38 30 W. 1056 feet to the place of BEGINNING, containing 7.64 acres.

PARCEL NO. 2: That certain tract or parcel of land, situated on Upper Hensley Creek and Lower Hensley Creek and the waters of Tug River, in McDowell County, West Virginia, more particularly bounded and described as follows, to-wit:

BEGINNING at a double hemlock on a spur about 300 feet west of Upper Hensley Creek and about 500 feet from Tug River; thence S. 30 deg. 20′ W. 230 feet to a point in a line of Alex Trent 150 acres; thence with same and crossing old line of Norfolk and Western Railway to a point on the north bank of Tug River: thence with said bank of same Westward to the center of Lower Hensley Branch; thence leaving Tug River and up said Lower Hensley Creek N. 45 deg. W. 80 feet; N. 35 deg. 50′ W. 755 feet; N. 20 deg. 05′ W. 305 feet; N. 60 deg. 50′ W. 350 feet; N. 9 deg. 25′ E. 105 feet; N. 34 deg. 05′ W. 305 feet; N. 25 deg. 42′ W. 299 feet; N. 61 deg. 00′ W. 347 feet; N. 66 deg. 12′ W. 202 feet; N. 42 deg. 10′ W. 421 feet; N. 81 deg. 00′ W. 376 feet; N. 37 deg. 00′ W. 428 feet; N. 58 deg. 05′ W. 253 feet to a point in the creek at the fork; thence up the right Fork N. 44 deg. 45′ W. 363 feet; N. 0 deg. 10′ W. 218 feet; N. 25 deg. 15′ E. 154 feet; N. 13 deg. 20′ E. 163 feet; N. 33 deg. 54′ E. 38.5 feet; N. 58 deg. 30′ E. 181 feet; N. 1 deg. 50′ W. 195 feet; N. 26 deg. 20′ E. 162 feet; N. 6 deg. 45′ W. 301 feet; N. 9 deg. 30′ W. 231 feet; N. 24 deg. 12′ W. 161 feet; N. 22 deg. 45′ W. 154 feet; N. 56 deg. 25′ W. 160 feet to a point in the branch at a fork; thence up the right hand fork N. 48 deg. 30′ E. 710 feet; N. 34 deg. 00′ E. 179 feet; N. 2 deg. 25′ E. 247 feet; N. 27 deg. 25′ E. 357 feet; N. 45 deg. 35′ E. 150 feet to a point on the back line of the McCormick survey; thence with the said line S. 66 deg. 10′ E. 4300 feet to a point on the side line of the Hensley Land Company; thence with the side lines of said Hensley Land Company S. 11 deg. 53′ E. 1440 feet to a

dogwood and white oak; thence S. 8 deg. 10′ W. 780 feet to a point 20 feet below the outcrop of the Davy seam of coal; thence around the hill with a line parallel to and 20 feet below the said outcrop, S. 34 deg. 28′ W. 100 feet; S. 32 deg. 50′ W. 135 feet; S. 19 deg. 50 W. 277 feet; S. 10 deg. 52′ W. 259 feet; S. 42 deg. 52′ W. 120 feet; S. 52 deg. 33′ W. 113 feet; S. 20 deg. 50′ W. 370 feet; S. 22 deg. 43′ W. 153 feet; S. 16 deg. 00′ W. 149 feet; S. 23 deg. 17′ W. 65 feet; S. 66 deg. 07′ W. 58 feet; S. 73 deg. 00′ W. 25 feet to the point of BEGINNING, containing an area of 455 acres, more or less.

PARCEL NO. 3: That certain tract or parcel of land, lying on the waters of Tug River and West of Lower Hensley Creek, in McDowell County, West Virginia, more particularly bounded and described as follows, to-wit:

BEGINNING on an iron rail by a sycamore on the outcrop of the Sewell seam of coal in the first left hand hollow of Lower Hensley, a corner of Hampton Roads Collieries Company, and with one line of same S. 48 deg. 40′ W. 6380 feet to an iron rail in the right of way on the old line of the Norfolk and Western Railroad; thence with said right of way in a westerly direction for a distance of about 740 feet to a stake; thence leaving said right of way, up the center of a drain, N. 1 deg. 11′ W. 336 feet; N. 32 deg. 47′ W. 487 feet; N. 26 deg. 50′ W. 216 feet; N. 19 deg. 14′ W. 303 feet; N. 6 deg. 00′ W. 216 feet; N. 33 deg. 15′ W. 257 feet to a stake by two hickories near the head of a drain; thence N. 27 deg. 00′ E. 6072 feet to a stake in the center of Lower Hensley Creek; thence down said Lower Hensley Creek S. 70 deg. 00′ e. 1225 feet to a stake in the forks of said Creek; thence continuing down said creek S. 58 deg. 05′ E. 253 feet; S. 37 deg. 00′ E. 428 feet; S. 81 deg. 00′ E. 376 feet; S. 42 deg. 10′ E. 421 feet; S. 66 deg. 12′ E. 202 feet; S. 61 deg. 0′

E. 347 feet; S. 25 deg. 42′ E. 299 feet; S. 34 deg. 05′ E. 355 feet; S. 9 deg. 25′ W. 109 feet; S. 60 deg. 05′ E. 350 feet; S. 20 deg. 05′ E. 305 feet; S. 35 deg. 50′ E. 755 feet to a point in old line of Norfolk and Western Railroad right of way; thence with said right of way in a southern direction for a distance of 730 feet to a point on said right of way, a corner of Hampton Roads Collieries Company; thence straight up the hill, and with several lines of said Hampton Roads Collieries Company, S. 80 deg. 39′ W. 135 feet to a stake on the outcrop of the Sewell seam of coal; thence N. 9 deg. 20′ W. 71 feet; N. 10 deg. 27′ W. 37 feet; n. 25 deg. 26′ W. 77 feet; N. 7 deg. 35′ E. 97 feet; N. 20 deg. 53′ W. 51 feet; N. 13 deg. 28′ E. 117 feet; N. 8 deg. 48′ E. 38 feet; N. 12 deg. 53′ E. 96 feet; N. 49 deg. 53′ W. 225 feet; N. 81 deg. 57′ W. 70 feet; S. 87 deg. 38′ W. 144 feet; N. 77 deg. 10′ W. 140 feet to the BEGINNING, containing 547.7 acres, more or less; and being a part of the tract of land known as the Warren-Simpson Tract.

Being the same tracts or parcels of land which were conveyed by Famous Pocahontas Coal Company, a corporation, to Roderfield Realty Company, a corporation, by deed dated January 1, 1945, and recorded in the office of the Clerk of the County Court of McDowell County, West Virginia, in Deed Book No. 162, page 459; and being also a portion of the property conveyed to the party of the first part hereto by Roderfield Realty Company, a corporation, by deed dated May 16, 1958, and recorded in said Clerk's office in Deed Book No. 237, page 518, reference to both of which deeds is hereby made.

2. There is excepted and reserved from the operation of this deed:

(a) All the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described.

(b) All the timber situate on the tract of land herein described in Paragraph 1 as "PARCEL NO. 2", situate on the watershed of Upper Hensley Branch, sold by R. L. Page and wife to the J.B.B. Coal Company.

(c) All rights of way heretofore acquired by the Norfolk and Western Railway Company in or on any of the tracts above described.

(d) All rights of way heretofore acquired by the Appalachian Electric Power Company in or on any of the tracts above described.

(e) All rights of way heretofore acquired by the Chesapeake and Potomac Telephone Company in or on any of the tracts above described.

(f) The surface of that certain tract or parcel of land, containing 50 acres, more or less, out of the 547.7 acre tract hereinbefore described in Paragraph 1 as "PARCEL NO. 3", heretofore conveyed by Famous Pocahontas Coal Company, predecessor in title of the party of the first part, to Mrs. Cora Lee Smith, by deed dated April 15, 1940, and of record in said Clerk's office in Deed Book No. 159, page 288, to which deed reference is here made for a description of the surface land in this paragraph excepted.

(g) All that certain tract or parcel of land, containing 7.6 acres, more or less, out of the 547.7 acre tract hereinbefore described in Paragraph 1 as "PARCEL NO. 3", heretofore conveyed by Famous Pocahontas Coal Company, predecessor in title of the party of the first part, to S. M. Burgess, by deed dated December 2, 1938, and of record in said Clerk's office in Deed Book No. 141, page 103, to which deed reference is here made for a description of the tract of land in this paragraph excepted and reserved.

(h) The remaining surface in all of said tracts of land heretofore conveyed by Roderfield Realty Company, prede-

cessor in title of the party of the first part, to J. A. Blevins, by deed dated October 29, 1945, and recorded in said Clerk's office in Deed Book No. 165, page 420, reference to which deed is hereby made for a description of the surface land in this paragraph excepted and reserved.

3. This deed is made subject to the following described instruments:

(1) Agreement between Roderfield Realty Company, predecessor in title of the party of the first part, and United Fuel Gas Company, dated October 8, 1956, and recorded in said Clerk's office in Deed Book No. 227, page 412.

(2) Agreement between Famous Pocahontas Coal Company, predecessor in title of the party of the first part, and Hope Natural Gas Company, dated December 17, 1942, and recorded in said Clerk's office in Deed Book No. 156, page 133.

(3) All leases of the surface of the real estate hereinbefore described, which are now in existence, whether or [sic] record in said Clerk's office or not.

4. As a part of the consideration aforesaid, the party of the first part does hereby give and grant to the party of the second part the right and privilege of using, in common with the party of the first part, a strip of land thirty (30) feet in width up said Hensley Creek, as a right of way to the lands lying in the rear of the tract or parcel of land conveyed by Famous Pocahontas Coal Company to S. M. Burgess, by deed dated December 2, 1938, and recorded in said Clerk's office in Deed Book No. 141, page 103, to which deed reference is here made for a metes and bounds description of the tract of land through which said right of way extends.

5. As a part of the consideration aforesaid, the party of the f st part does hereby give and grant to the party

of the second part, to be used and enjoyed by him in common with the party of the first part, all the mining rights and privileges in connection with or appurtenant to said coal and minerals hereby granted, which the party of the first part has or is entitled to, incident to the ownership of the coal and minerals hereby conveyed, and specifically, but not by way of limitation or exclusion:

a. All and singular the mining rights and privileges excepted and reserved to Roderfield Realty Company, predecessor in title of the party of the first part, in that certain deed dated October 29, 1945, from Roderfield Realty Company to J. A. Blevins, of record in said Clerk's office in Deed Book No. 165, page 420, to which deed reference is here made for a description of said mining rights and privileges, and which said mining rights and privileges are now held and owned by the party of the first part.

b. All and singular the mining rights and privileges excepted and reserved to Famous Pocahontas Coal Company, predecessor in title of the party of the first part, in that certain deed dated April 15, 1940, from Famous Pocahontas Coal Company to Mrs. Cora Lee Smith, recorded in said Clerk's office in Deed Book No. 159, page 288, to which deed reference is hereby made for a description of said mining rights and privileges, and which said mining rights and privileges are now held and owned by the party of the first part.

6. It is understood and agreed that there is excepted and reserved to the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

7. It is further understood and agreed that, should the party of the first part be desirous of selling the coal in said No. 3 and No. 4 Pocahontas seams in, on or underlying said tracts of land, it shall first offer said seams of coal to the party of the second part for the time being at a price to be named by the party of the first part; and if the party of the second part shall not, within sixty (60) days, accept such offer, then the party of the first part shall be at liberty to sell said seams of coal to any other person, firm or corporation at the same or higher price, but shall not sell said seams to any other person, firm or corporation at a lower price, unless and until it shall have been offered to the party of the second part for the time being at such less price and such last-mentioned offer shall not have been accepted by the party of the second part within said sixty (60) day period.

8. It is further understood and agreed that the phrases "party of the first part" and "party of the second part" shall include not only the parties thereto, but their respective successors, heirs, legal representatives and assigns.

9. TO HAVE AND TO HOLD said coal and other minerals and mineral substances and said mining rights and privileges, together with the appurtenances thereunto belonging or in any wise appertaining, but subject to the exceptions, reservations, stipulations and agreements hereinbefore set forth, unto the party of the second part, his heirs and assigns, forever.

IN TESTIMONY WHEREOF, the said Tug Fork Land Company has caused these presents to be signed in its corporate name by its President, and has caused its corporate seal to be hereunto affixed; all as of the day, month and year first above written.

TUG FORK LAND COMPANY,

By Henry C. Barley
President

APPENDIX B

STUPID

Case	Punitive	Compensatory	Ratio
Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991)	$12,500,000	$9,025,000	1.4:1
Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991)	$5,000,000	$106,514	46.9:1
A. Doe, et al. v. B.P.S. Guard Services, Inc., 945 F.2d 1422 (5th Cir. 1991)	$35,000	$1,000	35:1
Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991) *cert. denied* —— U.S. ——, 112 S.Ct. 1175	$1,300,000	$5,001	260:1
Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991)	$87,500	$2,500	35:1
Liberty Transport, Inc., v. Harry W. Gorst Co., Inc., 229 Cal.App. 3d 417, 280 Cal.Rptr. 159 (Ca. App. 2 Dist. 1991)	$400,000	$82,500	4.8:1
Jennings v. Jessen, 407 S.E.2d 264 (N.C. App. 1991)	$300,000	vacated	—
Wolfe v. Goodyear Tire & Rubber Co., 808 S.W.2d 868 (Mo. App. 1991)	$250,000	$49,500	5.1:1
United Farm Bureau Mut. Ins. Co. v. Ira, 577 N.E.2d 588 (Ind. App. 1991)	$105,000	$55,000	1.9:1
Muehlstedt v. City of Lino Lakes, 473 N.W.2d 892 (Minn. App. 1991)	$70,000	$35,000	2:1

MEAN

Case	Punitive	Compensatory	Ratio
Browning-Ferris v. Kelco Industries, 492 U.S. 257 (1989)	$6,000,000	$51,000	117.6:1
Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), *rehearing denied* 951 F.2d 347, *cert. denied* —— U.S. ——, —— S.Ct. ——, 1992 WL 41923	$6,100,000	$317,625	19.2:1
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991)	$500,000	$1,000	500:1
Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991)	$28,000,000	$390,000	71.8:1
Robertson Oil Co., Inc. v. Phillips Petroleum Co., 779 F. Supp. 994 (W.D. Ark. 1991)	$8,000,000	$750,000	10.7:1
General Motors Corp. v. Johnston, 592 So.2d 1054 (Ala. 1992)	$7,500,000	$75,000	100:1

APPENDIX B

TXO Production Corp. v. Alliance Resources Corp.
No. 20281

[Filed July 22, 1992]

McHugh, Chief Justice, concurring:

Although I concur with much of the majority's analysis in the present case, I disagree with the majority's categorization of defendants against whom punitive damages have been awarded. The majority opinion categorizes these defendants as either "really mean" or "really stupid." In its cavalier attempt to be clever and amusing, the majority opinion has carelessly ignored the fundamental factors which have traditionally been used by courts to characterize the conduct of defendants in assessing punitive damages.

Punitive damages have historically been part of our state tort law. As the law has developed in this area, certain terms have been established to characterize the degree of reprehensibility of the defendant's conduct.

Our traditional rule summarizing the type of conduct that will give rise to punitive damages is found in syllabus point 1 of *Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991):

> "'"In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes, it, the jury may assess exemplary, punitive, or vindictive damages. . . ." Syllabus point 4, in part, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895).' Syllabus point 1, *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1932).

Not surprisingly, none of the courts in the punitive damages cases cited by the majority use the terms "really

stupid" or "really mean" when describing the defendant's actions in their review of the punitive damage awards. Instead, when characterizing the defendant's conduct, those courts use terms such as "conscious indifference," *Glassock v. Armstrong Cork Co.*, 946 F.2d 1085, 1093 (5th Cir. 1991), *reh'g denied*, 951 F.2d 347, *cert. denied*, *Celotex Corp. v. Glasscock*, 112 S. Ct. 1778, 118 L. Ed. 2d 435 (1992); "reckless, willful and wanton," *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 505 (4th Cir. 1991); "particularly egregious," *Eichoncoer v. Reserve Life Ins. Co.*, 944 F.2d 1377, 1382 (5th Cir. 1991); and "reprehensible," *Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501, 502 (Ga. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1175, 117 L. Ed. 2d 420 (1992) and *Gamble v. Stevenson*, 406 S.E.2d 350, 355 (S.C. 1991).

These terms are well-founded in our tort law, and I can see no useful purpose whatsoever in abandoning these terms for the ridiculous categorization proposed by the majority in its opinion today. The terms noted above are those upon which attorneys and judges have traditionally relied in assessing punitive damages awards. Unfortunately, by suggesting the use of such subjective and nontechnical terms as "really stupid" and "really mean," the majority has offered no practical guidance to attorneys or judges in analyzing punitive damages cases.

I am authorized to state that Justice Miller joins me in this concurring opinion.

APPENDIX C

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action No. 85-C-550

TXO PRODUCTION CORP., a Delaware corporation licensed to do business in West Virginia; AMERICAN PETROFINA COMPANY OF TEXAS, a corp.; FINADEL, INC., a corporation; APCOT-FINADEL GENERAL PARTNERSHIP, a Texas general partnership; and APCOT-FINADEL JOINT VENTURE, a general partnership,

Plaintiffs

v.

ALLIANCE RESOURCES CORP., a Texas corp., licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,

Defendants

Partial proceedings had and testimony taken in the trial of the above styled action before Honorable Bocker T. Stephens, Judge, and a jury, on Monday, June 18, 1990, Thursday, June 21, 1990, and Friday, June 22, 1990.

APPEARANCES

MR. TIMOTHY M. MILLER, Charleston, West Virginia, Counsel for the Plaintiffs.

MR. G. DAVID BRUMFIELD, Welch, West Virginia, Counsel for the Defendant Alliance Resources Corp.

MR. WADE T. WATSON, Bluefield, West Virginia, Counsel for the Defendant Tug Fork Land Company.

MR. GROVER C. GOODE, Welch, West Virginia, Counsel for the Defendant Grover C. Goode and Defendant George King.

* * * *

[792]

THURSDAY, SEPTEMBER 20, 1990
1:00 O'CLOCK P.M.

The proceedings at the hearing of motions on behalf of the plaintiff in the foregoing action were held before the Court with Timothy M. Miller, Esquire, Charleston, West Virginia, representing the plaintiff; G. David Brumfield, Esquire, Welch, West Virginia, representing the defendant Alliance Resources Corp. and Wade T. Watson, Esquire, Bluefield, West Virginia, representing the defendant Tug Fork Land Company, and were as follows:

THE COURT: The matters before the Court in this case are a motion to compel surety of bond, motion for judgment notwithstanding the verdict or in the alternative, motion for a new trial and in the second alternative, motion for remittitur. I also have a motion for TXO Production Corporation for a stay of enforcement of judgment pending appeal. Are those the only matters that are before me at this time?

MR. MILLER: That's correct, Your Honor.

THE COURT: Do you all agree?

MR. WATSON: Yes, sir. That's all.

THE COURT: All right. Let me take up the motion for judgment notwithstanding the verdict for a new trial. Let's do that first and let me say to you, I have read everything you [793] sent down here and it seems as if, and I just want you, in order to, I don't want to keep you from arguing anything, but it seems as if I have previously ruled on everything you have raised, except maybe the last two things that deal with punitive damages. Am I correct in my thinking on that?

MR. MILLER: You're correct, Your Honor, and as I was going to say, I was going to limit my argument today to the fact that we've briefed many of the issues that you see before you in the pre-trial stage for motions which are the motions to dismiss, motions in limine, as well as we placed those arguments on record at trial, so

I was going to limit my argument to those issues that may be new or there may be some new authorities in this case.

THE COURT: I would appreciate that and I am fairly consistent in my rulings.

MR. MILLER: I thought you would be, Your Honor.

THE COURT: My rulings don't usually change unless the Supreme Court changes them in their wisdom, because I feel I've looked at it very carefully. And I respect the fact that you may need to argue if there are new authorities in those areas that I have previously ruled on, but I would appreciate it, also, if you would just limit yourself to new matters. And I'm just saying for the record now that my previous rulings will not change in that respect. Okay?

MR. MILLER: I understand, Your Honor.

[794] THE COURT: All right.

MR. MILLER: And, again, I— I should start off by apologizing to the Court for submitting any brief 45 pages in length, but I felt compelled to because of the issues that had to be raised and we were compelled to raise them under the post-trial motions rule, but I think the first eight issues in our brief are clearly matters which the Court had previously ruled upon. We cited authorities. As you will recall, we submitted to you bench briefs, motions for summary judgments, motions to dismiss and motions in limine in virtually all of the evidentiary issues which are raised in the brief on the post-trial stage. I'm going to therefore try to limit my argument, if I can, to the issues which appear under argument IX related to the other acts and just point out to the Court a few authorities that may not have been cited in the motion in limine stage and that also then go primarily to the punitive damage arguments which I think are the last three arguments in the brief.

THE COURT: Very well.

MR. MILLER: So going to the Rule 404b argument, and, as you know, Your Honor, the, TXO objected at

trial to the video tape deposition of four attorneys who testified with respect to other litigation against TXO in Louisiana, Texas and Oklahoma. I thought that was violative of Rule 404b, as well as Rule 402, 403 and 802. In our brief, we did cite to you the various [795] authorities and in particular, Your Honor, when we briefed it before, we did not go into much elaborate discussion of the West Virginia case law. I think we cited to you various Fourth Circuit cases which deal with a need for reliability and the necessity of the evidence and the fact that there must be a legal connection between the acts or other acts and a tendency to show some motive, plan or intent in this litigation. But in State v. Thomas, Your Honor, as you will recall, Judge Hayden writing for the Court, indicated that there had to be a legal connection between the other crimes or acts and the one in litigation here and we felt that the testimony clearly showed, failed to show any relationship between those acts, either in point of time or, in other words, they were not close in proximity in time or they were not the same types of causes of action. Several of them were royalty disputes. Nor did they show any similarity of the parties in terms of their being. In this particular case you will recall the witnesses, Mike Good, Doug Black, Duncan Wood, etc., there was no evidence showing that those individuals had any connection whatsoever with the acts arising in other jurisdictions.

We feel that under that test in State v. Thomas, which is an old Fourth Circuit case, are also commented upon by Professor Cleckley in the same discussion on the subject but none of them is legal requirements of a legal connection were made in this case and therefore the evidence should not have been allowed in or [796] should have been stricken. I think all of the authorities we cited here are consistent in that regard and we cited the Fourth Circuit cases because of the lack of any particular West Virginia cases dealing directly with that point—the point on recent vintage.

THE COURT: Well, the ultimate test on that would be the balancing test under Rule 403. Would you tend to agree with that?

MR. MILLER: Actually, I think it was Professor Cleckley said that first of all, you have to go to relevancy.

THE COURT: Yeah.

MR. MILLER: That deals with a legal connection test.

THE COURT: It's— Then the ultimate test would be the balancing test as to whether or not the Court would let it in or not would be the balancing test under Rule 403.

MR. MILLER: That's part and parcel of it, yes.

THE COURT: Sure. Okay.

MR. MILLER: I won't belabor that point too much since we had briefed that pretty extensively before.

I'm going, then, really, to the issue here of excessiveness of the punitive damage award in this case. I think we did brief that on three aspects. No. 1, the admissibility of the testimony of Alliance's economist, Mr. Bruce Conrad, and I think that issue goes hand in hand with the question of the amount of the excessiveness of the punitive damage award. I think it was [797] clear by Mr. Conrad's testimony—First of all, we certainly admit under West Virginia law that one of the tests for punitive damages or one of the factors the jury should consider in awarding punitive damages is the financial standing or the ability of the party in this case, but I think it very clear from the discussion of the West Virginia case law, all talks in terms of financial ability of the party in the trial before the Court. We cited to you the cases that speak to that but don't directly talk about the case where you have a consolidated financial statement coming in evidence as we have here. Mr. Conrad admitted during cross-examination that his analysis of net worth was based upon a USX annual report and the composite net worth of 20 corporations identified as the TXO Division. For that reason, we moved to, over objection to the evidence in the first place, we then moved to strike the testi-

mony of Mr. Conrad, which the Court denied. I think the only cases or the new authority that I would like to point you to on page 29 of the brief. As I've indicated, we could not find West Virginia authorities directly on point that relate to this subject. We did find a number of cases from, one from Indiana, an intermediate appellate court in Indiana, an Alabama case and several federal district court cases. I'd like to point out that in each of those cases the only way the evidence was admitted in the first case, in Neal v. Cary Canadian Mines, that was one of the national asbestos suits [798] in which numerous parties were brought before the Court in action arising in the third district, U.S. District Court in Pennsylvania, in which Johns Manville was one of the parties, along with numerous Johns Manville subsidiaries and several of the defendants in that case had acquired the interest of a number of asbestos manufacturers and distributors. In that case, the court, without a whole lot of discussion, nevertheless felt that in that case the cause of action arose from the acts of the parent Johns Manville corporation and accordingly it was relevant to allow the consolidated financial return of Johns Manville Corporation, the parent in evidence.

The other cases, the intermediate appellate court in Indiana, was faced with a situation where the parent corporation piercing the corporate veil, a theory had been alleged, pursued and in that case actually tried. I believe that's the one where the parent corporation was actually made a party to the case by amendment of the pleadings. In the third case, the Alabama case, there was no objection made to the consolidated financial returns coming in at that trial and that was in large measure the reason for the appellate court saying that it was too late to raise that on appeal. The federal cases, the A. L. Laboratories case and the Herman v. Hess will case more directly on point very clearly indicated it would be error to admit the consolidated return in that case. Those were additional [799] authorities that, from a national

scope, we wanted to cite to you in this brief and I do not believe you have before you a brief of the issue before.

I think it was clear, though, Your Honor, that allowing in the testimony as to the composite net worth of the TXO Division is what gave rise to the excessive punitive damage award in this case. Analyzing it just from a West Virginia standpoint of what constitutes an excessive award, I think the authorities we cited to you make it pretty clear and in reviewing this more in a historical basis, I think you can see almost two lines of authority coming up through West Virginia law in the last hundred years. Cases which looked at it strictly on a mathematical ratio basis to determine what was an excessive award and typically they would look at those and I think I can represent to the Court there are a number of cases that held ratios of three to one of punitive to compensatory, while reviewed with an eye toward their excessiveness, typically would be considered to be reasonable under the facts and circumstances of certain case. Ratios of five to one in Leach v. Biscayne Oil, the '82 case. That was a ratio in issue there. The court indicated that under the facts of that case, that could be considered a reasonable ratio and under the other cases, that ratio has been analyzed, and I think cases of ten to one and above typically draw the ire of the Supreme Court as being excessive.

[800] Now, in Leach v. Biscayne Oil, they upheld a five to one ratio. And basically in the facts of that case, you had an oil and gas company which trespassed intentionally upon someone's land and did not have title to do that. Took a bulldozer, tore down a tree, built an access road to a well, constructed a well, put oil tanks on a well site and in the process destroyed a number of timbers, timber land, Your Honor. And then after the well was put in production, the storage tank leaked gas, a fire was started and it burned down additional acreage. In that case, we had about $8,000.00 compensatory, $44,000.00 punitive. The Court held that under the facts and circumstances of that case that the proportion of five to one is not unrea-

sonable, given the facts which seemed to show rather malicious spirit or intent in that case and actually they lost timber in that case.

Wells v. Smith has been briefed to Your Honor. While many people argue that that was the death knell of any analysis of proportional mathematical basis, I think we cited to you the language of that case which clearly showed it is still reasonable for the trial court to look at that proportionality to determine what is an excessive award. And in this particular case, the ratio is 526 to 1 and I think under any analysis by any of our old cases, under the first line of authority I mentioned to you, that would have clearly been excessive and awarded setting aside of the verdict as shocking the conscience, monstrous and [801] showing passion and prejudice. Even under the new line of authority, Your Honor, where the ratio is but one factor to be taken into consideration, the court seems to say that that ratio can be, certainly, evidence that should justify a finding by the court of passion, prejudice and setting it aside. But that the court should also look to the nature of the cause of action, the type of injuries actually suffered by the parties and that the ratio alone does not control. In this case, I think it was apparent from the jury's findings in this case that the only compensatory damages that they awarded were the attorney's fees incurred in the quiet title action. That was not on trial. If you recall, we were trying only the counterclaim in this case. And in essence, therefore, found there was no injury in fact to the parties. Over our objection, we had the testimony of Brian Robinson and an official from the Department of Energy about the oil and gas properties in question, yet there were no awards of damages that would relate to, to indicate that the jury felt there was any kind of compensatory damage or injuries in fact suffered by the parties in this case. That being the case, that ratio is obviously much greater than 526 to 1, but I think under the Wells v Smith analysis, if you look at the ratio, it appears patently excessive. And then if you consider the fact that there was no in-

jury in fact, and by that I mean, Your Honor, our Supreme Court in defamation cases, which may be [802] of some analogous help in looking at this case, have upheld awards because the personal reputation of a person awarded damages may have been destroyed. While that person could not show an actual economic loss, nevertheless our courts have held in defamation cases before that if a person's reputation may not be able to be equated to a dollar and cents value, but there were some vindictive rights to compensation which you can't equate just between compensatory and puntive damages.

In this case, there was no testimony to show that this allegedly libelous publication was distributed to a third party. Under any liable case, one essential element is for it to be published to a third party and because of that, in the eyes of maybe that third person or the community, the reputation of the wrong party is involved. There was no testimony to that fact. There's merely testimony here that because we had to go through a quiet title action, we have these attorney's fees and expenses, etc. to clear that title. Another factor, Your Honor, is the fact that it was a temporary injury, if any injury at all. In connection with filing the quit claim deed, TXO initiated the declaratory judgment action so that this Court could, once and for all, clear title to these oil and gas properties in question. The Court did that. So there is no continuing injury like you would have with a personal injury case or you might have somebody with continuing medical bills or suffering from anguish of disfiguring scars for the rest of their lives. There is not the [803] injurious fact that would justify that kind of ratio of punitive to compensatory. So I think even under the more recent line of authorities regarding the rational relationship rule that this verdict fails that test and under our recent Supreme Court holdings would fully justify setting aside the award and granting us a new trial in this case.

Finally, Your Honor, I think we saw briefed here the Constitutional issue in the damage award and I'm sure

the Court's aware that it has drawn a whole lot of law review commentary and also publications of recent vintage, but I think again that the award in this case, in given the Wells standard and general punitive damage instruction given in this case, the jury was left to their own devices without any yardstick as to what was a reasonable punitive damage award. And for that reason, a vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award, in essence, would cause the Court or should cause the Court to set it aside on Constitutional grounds.

The traditional test could serve as a basis for setting aside the puntive damage award. Wells v. Smith standard would certainly, in our opinion, serve as a basis for setting aside the award in this case, without reaching a Constitutional issue, but even if it doesn't because of the vagueness of that standard, that clearly under Constitutional principles that it would justify [804] in this case. You will note as recited in the Georgia case, a recent 1988 case, Covalina Pipeline versus Brown, in which the Supreme Court in Georgia was faced with this issue held that regardless of the United States Supreme Court's application or lack of application to the excessive fines clause in civil cases that under the state Constitution they would hold an excessive fine clause did apply to the state proceedings and therefore was an unconstitutional denial of process or—Excuse me. They didn't reach the process on the excessive fines clause. They set aside the award in that case.

THE COURT: West Virginia hasn't had the opportunity to decide that yet, have they?

MR. MILLER: I don't believe they have, Your Honor.

The Georgia case we did not cite here—maybe we should have put it in the citation—was appealed to the United States Supreme Court on a discretionary writ and they did deny to take the case and for that reason, the holding of that case stands, but for Constitutional rules

a state court has the authority to set aside a punitive damage award as violative of the excessive fines clause.

The due process argument, I think, is briefed from the stand-point that in Bankers Life several members of the Supreme Court in a concurring opinion did indicate that punitive damage awards or excessive punitive damage awards under instructions and case law [805] similar to our state's does or could certainly violate that fundamental fairness standpoint of due process and would justify the Supreme Court taking a look at it on a Constitutional basis. I would think in this case in the Browning Farris case, they did not reach the due process because it was not raised in the post-trial motions and trial stage. We're doing that here, so I see nothing from the existing status of the U.S. Supreme Court cases that would prohibit this Court from overturning this award as grossly excessive and unconstitutional.

We're prepared to argue at length, if you would like, many of these issues, but I think since we did submit a rather lengthy brief with citations to the Court in support of our position, we appreciate the Court's taking the time to review our brief that we submitted in this matter, but I don't think I can stress strongly enough, Your Honor, but we've searched high and low and can't find anything under similar factual circumstances that could justify punitive damages award like this. It should be set aside.

One case we did not discuss in the brief but I want to raise because Mr. Watson did raise it during pre-trial motion stage. They relied upon a slander of title case, Summa Corporation v. Greenspun, a 1983 case in which a one million dollar punitive damage award was upheld in a slander of title cause of action. And that was considered on appeal on the basis of its [806] gross excess, etc. We would argue that that case gives no justification for an award in this case. First of all, the facts of that case show that Summa Corporation was owned by and controlled by the famous Howard Hughes and that he

had used that corporation for personal vindictive reasons to get at a party in that case and used the board of directors in that case to record a deed of trust to tie up property when he had entered into a contract with a party not to do so. And that the facts of that case showed such a clear and egregious intentional effort to tie up the property for the purpose of getting at the plaintiff in that case that justified the—The Nevada Supreme Court held it justified the award in the case.

I think that was cited by Mr. Watson as a good lawyer, certainly, because that was a large award and probably the largest that could be found and yet it pales in comparison to the award in this case.

THE COURT: What could be more egregious than the vice president of a company saying, well, testifying and saying that he knew all along that this property belonged to Tug Fork? I forget his name, but it was—

MR. WATSON: Michael Good.

THE COURT: Who?

MR. WATSON: Michael Good.

THE COURT: Michael Good—testified on the stand, he says, [807] I didn't think that title report was right that Mr. Skeen—Said, I knew all along that it was wrong.

MR. MILLER: I don't believe that was quite his testimony.

THE COURT: Well, I'm paraphrasing. I'm certainly not—The record will speak for itself. I'm certainly paraphrasing, but I think that's what I got from that and not only did I get that from that testimony, I think the jury did, too.

MR. MILLER: Well, in connection with Mr. Good's testimony, if I can paraphrase it—

THE COURT: Sure.

MR. MILLER: —as I recall it. His testimony basically was that he reviewed the lease, he wasn't a lawyer, he looked about it, he couldn't state for certain one way or the other a hundred percent that it was or was not proper title. He didn't think there was a cloud on title,

but his outside counsel, Mr. Skeen, had written a title opinion letter in which he said there was a cloud on title. And under their contract and the company policy procedures, they could not proceed to drill the well unless and until outside counsel had approved title. And he, not being a lawyer, decided to follow the advice of his counsel. And his counsel said that those acts of taking the quit claim deed, etc. were necessary to clear title, then he approved that, upon the advice of outside counsel, as well as inhouse counsel, we would believe that under those facts it's not the same as the Summa [808] case.

THE COURT: I think he definitely said he wasn't a lawyer, but he said he had done a lot of these things in the capacity of his position. A number of them. He was the head man, wasn't he?

MR. MILLER: That's correct. He was the head of the Charleston office.

THE COURT: So— And I'm certainly not going to try to debate with you what he said. I mean, you heard it one way and I heard it another and the record, quite frankly, will speak for itself on that, but probably what you should do now in the interest of time is go on and get into your remittitur motion and then I'll give them an opportunity to respond. Okay? Or had you finished with the other?

MR. MILLER: No. I was going to address that subject, but I'll just do it all at once.

THE COURT: I wish you would.

MR. MILLER: And our second alternative, Your Honor, that we have cited to you a fact in a case that I'm sure everybody in this room is familiar with, Robert v. Stevens Clinic, in which our Supreme Court did order a remittitur. The same standard, basically, was employed in that case in trying to determine what was an excessive award. And I think it's clear in that case certainly the loss sustained by the plaintiffs, a two year old [809] infant, being a loss to a family memeber—the family of a mother and father and sisters or brothers. Under the

underlying facts of what caused the death in that case, clearly could have evoked certain amount of passion and sympathy that this case does not justify. The Supreme Court, in that case, felt that twelve million dollars was grossly excessive, remitted that award—

THE COURT: It was ten million, wasn't it?

MR. MILLER: I'm sorry. Ten million dollars and remitted it to three million, as I recall, Your Honor, and I think in that case a personal injury under the traditional test of what's excessive, the personal injury offsets the question of the ratio and justifies a higher ratio. In this case, we don't have the personal injury or loss of a family member and regardless of whether, what TXO did was right or wrong, in my view, the jury held it wasn't wrong and awarded punitive damages, nevertheless, that was grossly excessive in light of the Supreme Court's holding in the Roberts case. That's the only case, I think, that really is of recent vintage that's helpful in deciding a remittitur. I think, however, that the Wells case and the Leach case, particularly the Leach case, do give guidance to the Court in determining what is excessive and we have already argued that point to you.

I guess as our second alternative should the Court decide not to set aside the award and grant a new trial in this case [810] that the trial court should, nevertheless, under the standards of Leach, Wells and Roberts v. Stevens Clinic, clearly remit an award to a reasonable portion under the analysis of the Supreme Court.

That will conclude my remarks on that, Your Honor, and the other motion that we filed was, I guess, almost a third alternative motion and typically I would have filed it after your ruling on this matter, but I saw that Mr. Brumfield had filed his motion to compel surety and thought that to save time I'd go ahead and get this one on the record in the event that you deny our post-trial motions, Your Honor, we obviously wanted to let the Court know that we would like through Rule 62 and Rule 6 of the appellate rules a motion for stay, which I think would clearly be appropriate for us to take up the issue

of the appeal and we would promptly expect to do so. For that reason, I move under the revised rules where we get a four month appeal period, I think that the Court could clearly under those rules, should stay any portion of the judgments while we pursue the appeal.

Thank you, Your Honor.

THE COURT: Thank you. Who will respond?

Don't fight each other. One of you just stand up and start talking.

MR. BRUMFIELD: Your Honor, let me address the punitive—

THE COURT: Or both of you. I'll let both of you say something. That's all right.

[811] MR. BRUMFIELD: To go to the punitive damage argument, Your Honor, the passion part of it, I think the jury— I don't recall, but I think it was around a four hour deliberation. There was fraud, slander of title shown, as the Court's already enunciated at the highest level, highest corporate level. He made just now reference while he was head of the Charleston office, but what he was, was— Two things are important. One, he was vice president, executive vice president, of this particular corporation, TXO Production Corp., and he also was an officer of the parent corporation, TXO, in fact testified he was an employee that they now— And that laps over the other objection. He was an employee of Texas Oil and Gas Corp., as was most of the witnesses who actually did the acts complained of on a county and statewide level, represented themselves to be employees of TXO Production Corp., testified, however, that they were only assigned to the division by the parent corporation by whom they were employed.

Now, the jury saw what we saw, what we said. There was fraud and there was a contempt for not only the rights of the defendants, there was a contempt for this Court and a contempt for the whole judicial process. We caught their employees in misrepresentations. There were admissions on the stand, and, irrespective of that, they still were cavalier enough to refuse proper discovery, re-

fused to disclose any financial records. So [812] then, as the Court recalls, we did the best we could with the Ph.D., reconstructed their analysis, which we think is proper from two standpoints. One, because of waiver. They refused to give us their own records, refused to provide them to the Court or to counsel, so we reconstructed based upon public records, based upon what the testimony was was a proper way to evaluate it, and then having done that, it was proper also in this case because the acts were approved by the parent corporation anyway.

Secondly, at that point in time, TXO Production Corp. could have come in and offered some rebuttal testimony if they thought that the analysis of 1.5 to two billion dollars of assets and net worth was off base, but, no, they didn't. That was the evidence the jury heard, and the only evidence. So you had waiver again. He's— TXO certainly had an opportunity to have offered rebuttal testimony and chose not to. I think that the evidence clearly is, then, that our evidence as proper—the evaluation of the corporation and the division. As far as proportionality, because of this argument, well, we had evidence from the State Department of Energy employee, plus one of our clients, Brian Robinson, who is an expert in the industry, concerning the fact that there were permanent damages to this property, not temporary, that the damages could be considered as high as $800,000.00. Now, rather than get into that on closing argument, since they had evidence of their own experts that, no, [813] they're not that high, what we did, we just basically didn't argue that. Because we had uncontradicted damages. They acknowledged the fact that the compensatory damages the jury returned, there was no question about. And so— I only want to mention that from the standpoint that the jury could have, if they had wanted, come out here with a verdict of $800,000.00 compensatory and $10,000,000.00 punitive and maybe they took that in consideration in arriving at the punitive, but there was evidence. We just didn't argue at the closing because here was a contest between the parties as to that, but not as to the other issues.

The Constitutionality of, that they raise now, I believe they've waived that. The only Constitutional argument raised by TXO Production Corp. heretofore was the First Amendment argument. They said, if you recall, they said that they didn't, that the Court can't impose a limitation on their right to slander title. They have a right to say what they want under the First Amendment privilege. The only Constitutional argument heretofore raised prior to the verdict wasn't raised when we were arguing the instructions and it wasn't, hasn't been heretofore raised and I think it's waived. Secondly, concerning the allegations that they now raise, these are the same type arguments that were raised in Crinshaw v. Ford, 174 Cal. Rep. 348 to 81. That's the case where the Pinto fire, the rear end explosion case. Evidence that Ford makes, could have prevented for $11.00. They just made a cost analysis. We don't want to. We're gonna have [814] 180 people incinerated. We'll pay off those 180 people, we'll still make more money than, to build the cars cheaper. In this case, there was a reason. We proved, no question about it, they knew exactly what they were doing. As the Court's already pointed out, they knew what they did was wrong, they didn't care, they didn't think they'd get caught. If they got caught, they wouldn't get caught this bad. And that's why jury verdicts, subject to the Court's protection of excessiveness, is fair and reasonable. It's not a denial of due process. There's no disproportionality taking all the circumstances because of the size of this mega-conglomerate and we only evaluated this particular division of USX.

Jury discretion and lack of some predictability is actually well served. If TXO, like Ford, had been able to go back and say, well, the worst we can get hit in McDowell County, West Virginia, is x number of dollars. Go ahead and steal the property. Just like the, Ford did in the Crinshaw case. Let's go ahead, don't put $11.00 to build a fire wall. We'll incinerate 180 people a year, we'll still pay them off, it'll still be cheaper than spending the

money. Some— There has to be some predictability. As far as the excessiveness. How could it be excessive? If Your Honor recalls, and I'm sure you do, you directed us the morning of trial to enter into settlement negotiations before you started you asked us, Mr. Miller, I [815] remember, popped up and, I said, no, Your Honor, it couldn't be, and he popped up and made some statement, yeah, they want ten million dollars. And I said, yes, they offered twenty-five, and I said— I said— No, pardon me. They said they wanted five million dollars. And I said they'd settle for twenty-five and I also told the Court at that time that I told Mr. Miller that I would not be surprised— I recognized that we could lose the case and they could win it. The uncertainty of a jury. But I also told Mr. Miller, and I told the Court that morning, I believe, that I would not be surprised if the jury returned a verdict in the range of 12 to 15 million dollars. Well, what it turns out was, we were right— His response at that time was, well, our people say if you want that, you sue us and try to collect it. My response, I think I told the Court, it was okay, we'll do that. Now— Now, they cry foul.

That's all I have, Your Honor.

THE COURT: You may respond. You've got two minutes.

MR. MILLER: Thank you, Your Honor.

Your Honor, first of all, regarding the settlement discussion in this case, you will recall that I got in this case rather late, right before trial. I don't know what discussions took place before that time, so I'm not going to make reference and tell you on the record what happened.

THE COURT: You remember what I did, don't you? [816] MR. MILLER: On the morning of trial when we were in your chambers, you directed us to discuss settlement. I will represent apparently from my standpoint that we entered into those discussions, we were faced with special damages or specials that would be put on the blackboard of $19,000.00. We made a $25,000.00 offer at that point. I had my client with me and was prepared to dis-

cuss more than that if we could get in the same ballpark. I was told, unequivocably, that unless you are going to pay us five million dollars today, there's no need to discuss this any further. And as I did tell Mr. Brumfield, my client will not agree with a five million dollar settlement, we're gonna have to go to trial, which we did. We were not in the same ballpark, obviously, on that.

Now, as far as the argument about broad mispresentation—

THE COURT: They could have saved five million if they had settled.

MR. MILLER: That's one way to look at it, Your Honor. That's true.

Regarding the allegations of fraud and misrepresentation and piercing the corporate veil, those arguments, let me point out, Your Honor, it's a slander of title cause of action, not a fraud or misrepresentation action. Secondly, on piercing and the actions of Texas Oil and Gas, they were not made a party to this proceeding and a motion was filed in that regard. Nor was [817] there any allegation or motion to do that. For that reason, we all think it was proper. Nor was that the reason offered at trial for allowing in the consolidated financial statements.

Your Honor, as far as the Constitutional argument whether there was a waiver or not, I don't believe a waiver would apply in the case. The Supreme Court's indicated that a appropriate stage to raise it would be in post-trial motions, but absent that, the Supreme Court will not review it and the Bankers Life case, we have raised it in a timely basis here.

Thank you, Your Honor.

THE COURT: All right.

Now, I'll hear from you on your motion for the bond. Are you withdrawing that motion?

MR. BRUMFIELD: No, Your Honor. We would move— We have no problem with the stay of execution, but that's separate and apart from our request for a bond. There was evidence given at trial and there's documented evidence that were filed as exhibits with our mo-

tion of USX's attempt to sell the assets of this particular corporation, deplete it. They now, since the trial, have actually announced to the SEC and to those on Wall Street that they've restructured and now it's a part of the division of Marathon. We believe this is sufficient for the Court to protect the rights of the four defendants in this case that have obtained the verdict and require TXO, in this case we'd [818] be satisfied if the bond would be signed off by USX or Marathon, but one of those two, Texas Oil and Gas really no longer, is not even— TXO Production Corp., as I read their, the exhibits we filed, it's not even part of that now. They've restructured that. They've sold off most of TXO Production Corp.'s assets. They attempted to sell all of them. So we ask that the Court require a bond—

THE COURT: I'm prepared to rule now.

As to the motion for judgment notwithstanding the verdict or in the alternative motion for a new trial, will be denied and overruled.

Motion for remittitur is denied and the defendant will post a surety bond equal to the amount of the judgment herein, including any interest.

Prepare an order accordingly and show the objection and exception of the parties. And your stay is granted, Mr. Miller, to give you time to appeal.

MR. MILLER: Thank you, Your Honor.

Thereupon the proceeding were concluded on this date.

APPENDIX D

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action No: 85-C-550

TXO PRODUCTION CORP., a Delaware Corporation
Licensed to do Business in West Virginia,
Plaintiff,

vs:

ALLIANCE RESOURCES CORP., a Texas Corporation Licensed to do Business in West Virginia; TUG FORK LAND COMPANY, a West Virginia Corporation; GEORGE KING, an Individual, and GROVER C. GOODE, an Individual,
Defendants.

ORDER

On the 20th day of September, 1990, came the parties, by counsel, pursuant to plaintiff's written Motion To Set Aside the Judgment Notwithstanding the Verdict, or in the Alternative Motion for a New Trial, or in the Second Alternative, Motion for Remittitur, plaintiff's Motion for a Stay of Execution on the Judgment Herein in the Event the Court Denies its Motions, and pursuant to the Motion of defendants to require plaintiff to post a surety bond on the judgment herein.

Whereupon, the Court proceeded to hear arguments of counsel on all of the above Motions and after considering the same, the written Motions of the parties, and memoranda in support thereof, the Court doth overrule the Motion of plaintiff to Set Aside the Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion for a Remittitur. It is, accordingly, AD-

JUDGED and ORDERED that the Motion of plaintiff, TXO Production Corp., for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion for Remittitur, be and the same are hereby denied.

The Court doth sustain plaintiff's Motion to Stay Execution upon the verdict pending prosecution of plaintiff's Petition for Appeal herein. It is, accordingly, ORDERED, subject to plaintiff posting surety as hereinafter provided, that defendants are enjoined from executing upon the judgment rendered herein in favor of defendants and against plaintiff during the pendency of the time which plaintiff may, pursuant to law, petition the West Virginia Supreme Court of Appeals for appeal.

The Court doth sustain defendants' Motion to require plaintiff to post surety during the prosecution of an appeal herein. It is, accordingly, ORDERED that plaintiff post surety sufficient to cover the amount of the jury verdict, judgment thereon, plus interest on the verdict.

ENTER this 28th day of September, 1990.

/s/ Booker S. Stephens
Judge

APPROVED:

/s/ Timothy M. Miller
Counsel for Plaintiff

/s/ G. David Braunfield

/s/ Wade T. Watson
Counsel for Defendants

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of June, 1992, the following order was made and entered:

No. 20281

TXO PRODUCTION CORPORATION, a Delaware corporation licensed to do business in West Virginia,
Plaintiff Below,
Appellant

vs.

ALLIANCE RESOURCES CORPORATION, a Texas corporation licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,
Defendants Below,
Appellees

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, along with the brief Amicus Curiae tendered by the West Virginia Chamber of Commerce, filed on the 22nd day of June, 1992, in support thereof, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ [illegible]
Clerk
Supreme Court of Appeals